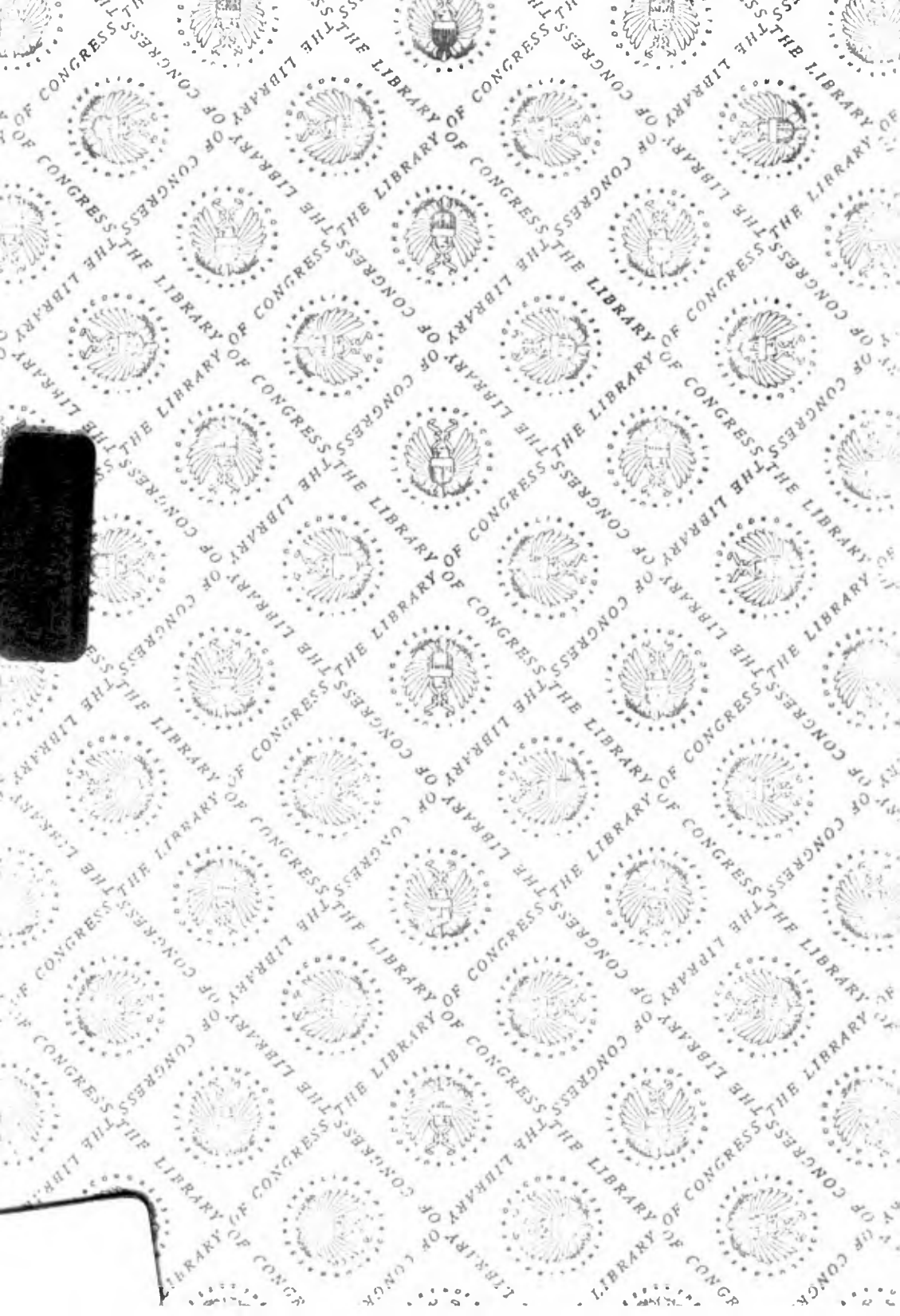
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CHEROKEE NATION OF OKLAHOMA

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

H.R. 2329

CHEROKEE NATION OF OKLAHOMA

DECEMBER 9, 1981

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CONTENTS

CHEROKEE NATION OF OKLAHOMA

WEDNESDAY, DECEMBER 9, 1981

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS,
HOUSE JUDICIARY COMMITTEE,
Washington, D.C.

The subcommittee met, pursuant to other business, at 11:30 a.m., in room 2237, Rayburn House Office Building, Hon. George E. Danielson (chairman of the subcommittee) presiding.

Present: Representatives Danielson, Synar, and Kindness.

Staff present: William P. Shattuck, counsel; Wade Harrison, assistant counsel; Jim McMahon, associate counsel.

Mr. DANIELSON. The subcommittee will come to order again. Our next bill is H.R. 2329, to confer jurisdiction on the courts to hear certain claims of the Cherokee Nation of Oklahoma. Mr. Mike Synar, one of our colleagues from Oklahoma, is author of the bill.

[The following was received for the record:]

I

97TH CONGRESS
1ST SESSION

H. R. 2329

Conferring jurisdiction on certain courts of the United States to hear and render judgment in connection with certain claims of the Cherokee Nation of Oklahoma.

IN THE HOUSE OF REPRESENTATIVES

MARCH 4, 1981

Mr. SYNAR introduced the following bill; which was referred jointly to the Committees on Interior and Insular Affairs and the Judiciary

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A BILL

Conferring jurisdiction on certain courts of the United States to hear and render judgment in connection with certain claims of the Cherokee Nation of Oklahoma.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding sections 2401 and 2501 of title 28, United States Code, and section 12 of the Act of August 13, 1946, as amended (the Indian Claims Commission Act, 60 Stat. 1049, 1052; 25 U.S.C. 70k), jurisdiction is hereby conferred upon the United States Court of Claims, or upon the United States District Court for the Eastern District of Okla-

homa, to hear, determine, and render judgment, under the jurisdictional provisions of section 2 of the Indian Claims Commission Act of August 13, 1946, as amended (60 Stat. 1049, 1050; 25 U.S.C. 70a), on any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal assets related to and arising from construction of the Arkansas River Navigation System, including, but not limited to, the value of sand, gravel, coal, and other resources taken, the value of damsites and powerheads of dams constructed on that part of the Arkansas riverbed within Cherokee domain in Oklahoma, without the authority or consent of said Cherokee Nation; and also on any claim which the Cherokee Nation of Oklahoma may have against the United States resulting from any action under section 14 of the Act of April 26, 1906 (34 Stat. 137, 142), wherein the United States gave away to third parties lands for what are known as station grounds of railroads, said lands being segregated from Cherokee Nation tribal lands without compensation to said Cherokee Nation of Oklahoma therefor; all of said lands or interests therein being held by said Cherokee Nation by virtue of treaties and by patent issued by the United States granting said lands to said Cherokee Nation in fee simple, or otherwise: *Provided*, That any tribe, nation, band, or group may bring a claim arising out of the circumstances described in section of this Act,

if said claim is held in common with the Cherokee Nation of Oklahoma. Any party to any action thus brought under this Act shall have a right to review, as provided under existing law.

O

Mr. DANIELSON. We have with us today Ross O. Swimmer, principal chief of the Cherokee Nation of Oklahoma and Mr. Anthony Liotta, the Deputy Assistant Attorney General; Land and Natural Resources Division, Department of Justice.

Will you wait for a second, sir, and we will get to you. Mr. Synar, would you——

TESTIMONY OF HON. MIKE SYNAR OF OKLAHOMA

Mr. SYNAR. Yes; I would like to make an opening statement. Legislation under consideration today, which I introduced, would simply waive any applicable statute of limitations to allow the Cherokee Nation of Oklahoma to bring suit against the U.S. Government for two claims of long standing.

The first claim arises from action taken by the U.S. Government to segregate from the Cherokee tribal lands what is known as station grounds for use by railroads. The United States then gave away those lands to third parties, without providing compensation to the Cherokee Nation. The right of the tribe to recover the value of these tribal lands thus given away was confirmed in a case involving similar station grounds entitled, *Seminole Nation* v. *the United States.*

The second claim arises from the construction of the congressionally authorized McClellan-Kerr Arkansas River navigation system in 1946. The Supreme Court ruled in 1970 that the Cherokee Nation owned in fee simple title the portion of the riverbed between the confluences of the Canadian and Grand Rivers. At the time of authorization of the project, the Congress erroneously believed that the riverbed land and resources belonged to the State of Oklahoma, and thus no compensation was awarded to the tribe for the irrevocable loss of certain riverbed resources.

Despite years of negotiations with the tribe and the reaching of an informal settlement in 1978, the Department of the Interior and the Office of Management and Budget in 1979 claimed that the U.S. Government had no legal obligation to compensate the tribe for these losses, ostensibly based on the Government's paramount rights of navigational servitude.

However, at the same time, an opinion from the Interior Solicitor to the Secretary of Interior stated firmly that had the Congress known at the time of authorization of the project that the riverbed and its resources were owned by the tribe, it would have authorized

compensation to the Cherokee Nation. He further indicated that the Supreme Court ruling of 1970 preceded congressional authorization of that project. The Interior Secretary's trust obligation to protect the property interests of the Indian tribes would have compelled a request for legislation to compensate the tribe.

Last year, during congressional hearings on the Interior Department appropriations bill, Interior witnesses indicated that in order to resolve this claim, the tribe would simply have to bring suit against the Government. The legislation before the subcommittee today would accomplish that goal by waiving any applicable statute of limitation on the cases.

I might add if the Government has no liability, the Court can so rule. If, on the other hand, there is liability on our part and compensation is due the tribe, the Court will award that compensation without further delay.

The Congress has a unique relationship and special responsibility to American Indian tribes. And we must be ever mindful of that fact as we review this today.

Our responsibility to the Cherokee Nation, both legally and morally, compels nothing less than the adoption of this legislation to allow the tribe to seek judicial remedy for these claims.

I hope you will consider this legislation favorably and with all due speed.

Now, Mr. Chairman, at this point I would like to ask unanimous consent to revise and extend my remarks after my opening statement.

[The information referred to follows:]

PREPARED STATEMENT OF HON. MIKE SYNAR OF OKLAHOMA

Mr. Chairman, members of the subcommittee, I first want to thank each of you for taking time this morning to hear testimony on H.R. 2329, legislation which I introduced, to confer jurisdiction on certain courts to hear and render judgment with respect to two claims of the Cherokee Nation of Oklahoma against the U.S. Government. As most of you know, I introduced similar legislation in the last Congress, but due to the press of time and other matters, it was not considered by the subcommittee or by the House Interior Committee which has joint jurisdiction over the bill.

I intend to speak only briefly, and I then want to turn the issue over to our primary witness today, Mr. Ross Swimmer, principal chief of the Cherokee Nation. Chief Swimmer, in his testimony, will be providing more background and detail on the two claims.

Mr. Chairman, my legislation is very simple: it waives any statutes of limitation, if they apply, to allow the Cherokee Nation to file suit against the U.S. Government for two claims of long standing. In one case, involving certain "station grounds" the precedents are clear—the Government having already settled similar cases in the past few years. In the other, principal, case there is no legal precedent to our knowledge, and the court would be called upon to hear the case and determine the extent, if any, of the Government's liability toward the tribe.

Let me give just a brief history, and let Chief Swimmer elaborate on the details. In 1946, the Congress authorized construction of the McClellan-Kerr Arkansas River Navigation System, a monumental project to make the Arkansas River navigable from Tulsa to the Mississippi River. At the time, the riverbed was believed to belong to the State of Oklahoma, the Government having erroneously given the land to Oklahoma at statehood. However, in 1970, the Supreme Court ruled that the riverbed, between the confluences of the Canadian and Grand Rivers, belonged to the Cherokee Nation—not the State of Oklahoma. Since that time, the tribe has made every possible good faith effort to work with the Government to resolve claims arising from the taking of its riverbed resources during construction of the Arkansas River project. For several years under the Carter administration, the tribe and the Department of Interior were involved in negotiations to settle the tribe's claim for

91-567 O—82——2

sand and gravel losses and, in fact, reached an informal negotiated settlement of $8.4 million for those resources. Then-Secretary of the Interior Cecil Andrus indicated to certin committees of Congress his intention to consider a request for appropriation of those funds to settle the claim in the administration's 1980 budget proposal to Congress. However, despite years of negotiation—good faith negotiation on the part of the tribe, at least—Interior and the Office of Management and Budget then indicated they had rejected the settlement proposal, claiming that the U.S. Government had no legal obligation to settle the claim. This assertion was based, according to them, on the Government's paramount rights of navigational servitude.

But, Mr. Chairman, there are some important footnotes which need to be stated here with regard to this case and the Government's obligations to the tribe. First, according to a Solicitor's memorandum to Secretary Andrus in 1979 with regard to this case, it is indicated that as a matter for consideration, no Federal court has ever refused compensation to an Indian tribe for the United States' use of tribal property in the bed of a navigable river. Further supporting the obligation of the United States in this case, the Solicitor states: "Although I feel that the three Indian Nations are not legally entitled to compensation for the loss of its natural resources in the riverbed, I believe that, had the Secretary of the Interior realized that title to a portion of the Arkansas riverbed vested in the three Indian Nations, he would have proposed, at the time Congress was considering authorizing the construction of the McClellan-Kerr navigation system, that special legislation be enacted to compensate the nations for the destruction of their property interests in the riverbed." He then goes on to cite several legal precedents for this conclusion. More concretely, he concludes, "In accordance with past history, I firmly believe that, had the Supreme Court's pronouncement in *Cherokee Nation* v. *Oklahoma, supra,* preceded congressional consideration of the construction of the McClellan-Kerr navigation system, the Secretary of Interior's trust obligation to protect the property interests of Indian tribes would have compelled a request for legislation to compensate (the tribes) for the destruction of their property interests in the Arkansas riverbed. The fact that the McClellan-Kerr project has been constructed and operating for the past 25 years does not make the enactment of such legislative request any less compelling at this time."

But, Mr. Chairman, despite the "compelling" reasons for settlement of this claim, Interior did not request such legislation. In fact, under questioning last year by members of the Senate Appropriations Subcommittee on Interior, Interior Department witnesses stated that the tribe would simply have to sue the Government to resolve the claim. In my mind, there is not question that the Interior Department should have positively acted on behalf of the Cherokee Nation years ago to settle this claim. But they have not. The Department's actions amount to nothing more than a series of foot-dragging and broken promises.

Because of this, we are here today to ask that you act favorably on this legislation to allow the Cherokee Nation of Oklahoma to do exactly what the Interior Department said they would have to do—go to court.

It has now been 11 years since the Supreme Court ruled that the tribe owned a great portion of the riverbed. Clearly, Congress could settle this claim itself by simply appropriating the funds. That would certainly be my preference, since the tribe has waited long enough and deserves to have the matter resolved once and for all. But we are not asking that Congress take that step. Rather, we simply ask that Congress allow the case to be filed and allow the court to determine the extent of the Government's liability.

If the Government has no liability, the court can so rule. If, on the other hand, there is liability on our part and compensation is due the tribe, the court will award that compensation without further delay.

I realize that this is an unusual action. But justice and fairness demand that we do no less.

The Government has a unique relationship with, and special responsibilities to, American Indian tribes, and we must be ever mindful of that fact. Our responsibility to the Cherokee Nation, both legally and morally, compels nothng less than adoption of this legislation to allow the tribe to seek judicial remedy for these claims.

I hope you will consider this legislation favorably and with all due speed.

Mr. Chairman, members of the subcommittee, if there are questions, I would be happy to respond to them. If not, I would like to introduce the witness testifying on behalf of the tribe, Mr. Ross Swimmer, principal chief of the Cherokee Nation.

Mr. SYNAR. And I would also ask unanimous consent that I may enter into the record, so that our subcommittee may have the fullest background on this subject, three pieces of information. First I

would like to submit a memorandum in support of H.R. 2329 outlining the complete history of both cases by one of our witnesses today, if that is correct and unanimously agreed to.

Mr. DANIELSON. Yes; without objection it is so ordered.

[The information referred to follows:]

MEMORANDUM IN SUPPORT OF H.R. 2329

After years of litigation, beginning in 1966, the United States Supreme Court held in 397 U.S. 620 (1970), that the Cherokee Nation, and the Choctaw and Chickasaw Nations owned the full fee simple title to the navigable portion of the Arkansas riverbed in Oklahoma from the confluence of the Grand Neosho River south to the western boundary of the State of Arkansas. In further litigation between the tribes, in 1975 the Federal Courts determined that the Cherokee Nation owned the entire bed of the Arkansas River within the Cherokee country, and also the north half of the riverbed along the common boundary of these tribes, or from the confluence of the Canadian River to the Arkansas State line, and the Choctaw and Chickasaw Nations owned the south half of the riverbed along the common boundary.

In 1973, 1974, and 1975 Congress appropriated $440,000 annually to fund a study to determine the extent and value of the Arkansas riverbed owned by these tribes. The study and appraisals of the assets of the riverbed were made under direction of the Secretary of the Interior, by competent appraisers under contracts of employment with the Department of the Interior.

In 1977 the Cherokee Nation endeavored to secure legislation to authorize the Secretary of the Interior to enter into an agreement with it for the lease or sale to the United States of that portion of the Arkansas riverbed it owned. Senate Bill S. 660, and H.R. 4377, 95th Cong., 1 Sess., were introduced in Congress to accomplish this purpose. Hearings were held before committees of both Houses. The proposed legislation was not enacted.

In 1979–80 the Cherokee Nation attempted to secure legislation to compensate it for the loss of sand and gravel assets, appraised at $8,400,000, caused by the action of the U.S. Corps of Army Engineers in dredging operations in that portion of the riverbed owned by the Cherokee Nation. Representatives of the Cherokee Nation appeared before the appropriate committees of both Houses of Congress in support of the proposed legislation. These efforts were unsuccessful.

During the hearing on the above proposed legislation, a question has arisen whether the United States is required to compensate the Cherokee Nation for the loss of its sand and gravel assets in the Arkansas riverbed caused by the U.S. Corps of Army Engineers in the exercise of its navigation easement in dredging operations in that part of the river owned in fee simple by the Cherokee Nation. The Corps believes that it can do so without incurring the liability of the United States; that the Cherokee Nation, having acquired said property from the State of Oklahoma in the litigation, stands in the same shoes as the State insofar as the rights of the Corps is concerned in the exercise of its navigational easement.

The Cherokee Nation disputes this premise for two reasons: (1) The Cherokee Nation did not acquire its fee simple title to the bed of the Arkansas River from the State of Oklahoma, but from a solemn patent issued to it by the United States in 1838, long before the State of Oklahoma came into existence in 1907, and the Supreme Court so held in the 1970 litigation; and (2) that no fiduciary relationship exists between the State of Oklahoma and the United States, as is present between the United States and the Cherokee Nation, a dependent Indian tribe.

That the United States is the trustee and the Cherokee Nation is its Indian ward has been decided in many cases by the United States Supreme Court. As early as 1831, in *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17, the Supreme Court determined that a fiduciary relationship existed between the United States and the Cherokee Nation. In *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294 (1902), the Supreme Court held that the United States had full administrative control over the property and affairs of the Cherokee Nation. In defining the fiduciary relationship between the United States, as trustee of the Indian tribes, the Supreme Court, in *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942), held that a trust relationship existed between the United States and the Indian tribes, and stated that the conduct of the United States (p. 297): "* * * as disclosed in the acts of those who represent it in dealings with the Indians, should be judged by the most exacting fiduciary standards."

In this same Seminole case, the Supreme Court cited and quoted from what Chief Judge (later Mr. Justice) Cardozo said in defining the fiduciary relationship in *Meinhard* v. *Salmon,* 249 N.Y. 458, 464, 164 N.E. 545, 546:

"Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

In *United States* v. *Creek Nation,* 295 U.S. 103, 109–110 (1935), the Supreme Court upheld the trust relationship that existed between the Indian tribes and the United States, and clearly defined the limitations of the United States, including all of its branches, in dealing with an Indian tribe's property covered by the trust relationship, as follows:

"The Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession. The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.' *Lane* v. *Pueblo of Santa Rosa,* 249 U.S. 110, 113; *Cherokee Nation* v. *Hitchcock, 187 U.S. 294, 307–308.*"

Under this decision the strong obligations of the United States, as trustee of the property of an Indian tribe, transcend any rights its various branches may have in and over Indian tribal property. However, the Cherokee Nation takes the position that the right of the U.S. Corps of Army Engineers to exercise its navigational easement, and the rights of the Cherokee Nation can coexist at the same time. The Corps can exercise its function in aid of navigation on that part of the Arkansas riverbed owned in fee simple by the Cherokee Nation; but when, in exercising its functions under the navigational easement, the Corps destroys Cherokee tribal assets held in trust for it by the United States, the Corps violates the Government's fiduciary obligation to preserve and protect these Indian tribal assets, and creates the liability of the United States to the Indian ward for the loss of its tribal assets.

Interestingly enough is the fact that the "implied right" of the Corps of Army Engineers to a navigational easement arises from the same provision of the United States Constitution which creates the trust relationship that exists between the United States and the Indian tribes. Article I, section 8 gives Congress the power "to regulate commerce * * * among the several States and with the Indian Tribes".

This is a unique situation in which an Indian tribe owns the riverbed of a navigable river in fee simple title. With the failure of Congress to respond to the above efforts of the Cherokee Nation to secure redress for the loss of its tribal assets, it has no other alternative than to seek plain justice in the courts of the United States through litigation proposed in H.R. 2329.

Should Congress authorize litigation on this issue another outstanding claim of the Cherokee Nation can also be finally settled under the provisions of H.R. 2329. This claim is described as follows:

Cherokee tribal lands were lost to the Cherokee Nation under the several railroad acts passed by Congress authorizing railroads to construct lines through the Cherokee tribal domain in Oklahoma. The railroads segregated from Cherokee lands for "station grounds" every 8 or 10 miles. These station grounds were never used for railroad purposes, as stations were built against the tracks and within the 100 feet of right of way. Although the railroad acts required these lands to revert to the Cherokee Nation when not used for railroad purposes, the railroads continued to hold them; and when towns and cities grew up around the station grounds, the railroads rented these Cherokee tribal lands out to third parties and thus enriched themselves at the expense of the Cherokee Nation. By section 14 of the act of April 26, 1906, 34 Stat. 137, 142, Congress gave away these Cherokee tribal lands to "municipalities", without providing compensation to the Cherokee Nation for them.

After many years of litigation, beginning in 1930, the U.S. Court of Claims in *Seminole Nation* v. *United States*, 203 Ct. Cl. 637 (1974), for the first time held that the United States was liable for the loss of these Seminole tribal lands within the station grounds in the Seminole Nation thus given away to third parties without providing compensation to the Indian tribe therefor. The Cherokee Nation would like to present a similar claim for its lands within the station grounds in the Cherokee Nation given away to third parties without providing compensation to it therefor.

Mr. SYNAR. Second, I would like to submit for the hearing record a letter from Secretary of Interior Cecil Andrus to Congressman Sidney Yates, chairman of the Interior Appropriations Subcommittee, dated June 16, 1978, in support of the negotiated settlement amount of $8.4 million and indicating Interior's position that this amount represents "a fair and just compensation for the sand and gravel claim."

Mr. DANIELSON. Without objections.

[The information referred to follows:]

JUNE 16, 1978.

Hon. SIDNEY R. YATES,
Chairman, Subcommittee on Interior and Related Agencies, Committee on Appropriations, House of Representatives, Washington, D.C.

DEAR MR. YATES: This letter is to advise you of the background and circumstances by which the Cherokee, Choctaw and Chickasaw Nations received title to a portion of the bed of the Arkansas River by treaty and patent from the United States and the current situation with respect to the settlement negotiated between the United States and the Cherokee Nation for the loss of sand and gravel deposits in that section of the riverbed belonging to the Cherokee Nation.

As a means of persuading the Cherokee, Choctaw and Chickasaw Nations to move west and allow for expansion of non-Indian settlement, the United States offered the nations large tracts of land in what is now Oklahoma. Treaties were then signed between the Indians and the United States. Pursuant to these treaties, the United States issued patents to the three tribes in 1838 and 1842, granting them fee simple title to their new lands. In the early 1900's the tribal lands were allotted to individual members of the tribes. However, the bed and banks of the River were excluded from allotment, reserving title to the tribes.

When Oklahoma was admitted to the Union in 1907, it was assumed that the riverbed belonged to the United States and therefore had passed to the State of Oklahoma. Based on this view, the Congress in 1946 authorized the construction of the McClellan-Kerr Arkansas River Navigation System by the Corps of Engineers (60 Stat. 634, 636). Since construction of that project, the Corps of Engineers through dredging operations and streamflow manipulation has taken sand and gravel deposits within the reach of the Arkansas River to which the Supreme Court later found title to be vested in the three nations.

In 1966, the Cherokee Nation brought suit in the United States District Court for the Eastern District of Oklahoma against the State of Oklahoma and various corporations to which the State had leased oil, gas and other mineral rights. The Cherokees sought to recover royalties derived from the leases and prevent future interference with its property rights, claiming that it had been, since 1835, the absolute fee simple owner of certain lands below the mean high water level of the Arkansas River. Subsequently, the Choctaws and Chickasaws sought and were granted leave to intervene in the case in order to present their claims that part of the riverbed belonged to them.

The United States Supreme Court in the case entitled, *Cherokee, Choctaw, and Chickasaw Nations* v. *State of Oklahoma*, 397 U.S. 620 (1970), held that the Cherokee Nation alone held fee title to the riverbed between the confluence of the Grand and Canadian Rivers and that the Choctaw and Chickasaw Nations alone held fee title between the confluence of the Canadian River and the Oklahoma-Arkansas border.

On April 15, 1975, a specially convened three-judge panel quieted title in the three nations in the judgment entitled *Choctaw and Chickasaw Nations* v. *Cherokee Nation* (civil case No. 73-332), and the lands within the Arkansas riverbed were delineated as follows: The Cherokee Nation owns exclusively that portion of the river between the Three Forks area to the confluence of the Canadian River and the north half of the river from its confluence with the Canadian River to the Oklaho-

ma-Arkansas border; and the Choctaw and Chickasaw Nations jointly own the south half of the river from its confluence with the Canadian River to the Oklahoma-Arkansas border.

Following the Supreme Court decision, Congress appropriated funds to the Department of the Interior in fiscal years 1973, 1974, and 1975 for studies to determine the extent and value of the three Indian Nations mineral reserves—including sand and gravel deposits—in the Arkansas riverbed between the confluence of the Grand and Canadian Rivers to the Arkansas-Oklahoma border. The Arkansas riverbed studies have now been completed and evaluated.

Based on those studies the Department entered into negotiations with the three nations in an effort to reach a settlement agreement with respect to the property interests of the tribes in the bed of the Arkansas River. Subsequently, negotiations with the Choctaw and Chickasaw Nations were suspended upon the issuance of an order by the United States district court for the District of Columbia restraining the Secretary from approving the disposition "in any manner" of the tribal property of those nations until the authority of the principal chief of the Choctaw Nation and the Governor of the Chickasaw Nation to execute an agreement to convey tribal property has been established.

In negotiations with the Cherokee Nation, the following informal agreement was reached: a payment shall be made by the U.S. Government in the amount of $8,453,818.88 as full compensation for all losses sustained to that nation's sand and gravel deposits in the Arkansas riverbed between the Grand and Canadian Rivers as a result of both past and future project operations by the Corps of Engineers; any future Congressional legislation authorizing and/or directing the Secretary of the Interior to execute an agreement with the Cherokee Nation for the purchase and/or lease of that nation's property interests in the Arkansas riverbed will be offset by the amount of this payment; and that the agreement itself shall not become binding and effective until funds for payment of the settlement are appropriated by the Congress and approved by the President of the United States.

Although we believe this negotiated settlement represents fair and just compensation for the losses sustained by the Cherokee Nation in the taking of their mineral assets from the Arkansas riverbed, it did not meet the criteria established by the administration for the consideration of supplemental funding requests or budget amendments. Our current plans are to consider this item in the development of the 1980 Budget.

Sincerely,

CECIL D. ANDRUS, *Secretary.*

Mr. SYNAR. And finally, Mr. Chairman, I would like to submit for the hearing record a memorandum from the Interior Solicitor to Interior Secretary outlining the history of the case and the obligations of the Secretary of the Interior to protect the best interests of the tribe, dated March 15, 1975.

Mr. DANIELSON. Without objection, so ordered.

[The information referred to follows:]

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., March 15, 1979.

To: Secretary.
From: Solicitor.
Subject: Clarification of the United States' Responsibilty to Cherokee Nation (and the Choctaw and Chickasaw Nations) with Respect to the Destruction of its Sand and Gravel Deposits in the Arkansas Riverbed.

You have requested my opinion as to whether the United States is legally obligated to compensate the Cherokee, Choctaw, and Chickasaw Nations for the destruction/taking of its sand and gravel deposits in the Arkansas riverbed.

The United States Army Corps of Engineers, by reason of the construction and operation of a navigation system, has taken much of three Indian Nations' sand and gravel deposits in the Arkansas riverbed. I am of the opinion that the United States is not constitutionally obligated to compensate the three Indian Nations for the loss of this natural resource. However, Congress has in the past authorized the appropriation of money to compensate other Indian tribes for the United States' destruction of natural resources in a navigable riverbed. Based on this precedent, I feel that Congress should likewise authorize monetary relief to the Cherokee Nation (and

Choctaw and Chickasaw Nations) for the loss of the sand and gravel in the Arkansas riverbed.

A brief recital of the background of the Indian Nations' claim is as follows: In 1969, the United States Supreme Court in the case entitled, *Cherokee, Choctaw and Chickasaw Nation* v. *State of Oklahoma,* 397 U.S. 620, considered the question of the ownership of the bed of the navigable portion of the Arkansas River in the State of Oklahoma and held that, with respect to the stretch of the river between the confluence of the Grand and Canadian Rivers, the Cherokee Nation alone holds fee title to the riverbed. The Court further held that, below the confluence with the Canadian River to the Oklahoma-Arkansas border, the Choctaw, Chickasaw, and Cherokee Nations hold title to the Arkansas riverbed. In a subsequent case entitled, *Choctaw and Chickasaw Nations* v. *Cherokee Nation,* 393 F. Supp. 224 (E.D. Okla. 1975), a three judge district court found that the Cherokee Nation owns fee simple title to the north half of the natural bed of the Arkansas River from its confluence with the Canadian River to the Oklahoma-Arkansas border and the Choctaw and Chickasaw Nations jointly own fee simple title to the south half of the bed in the same stretch of the river. Prior to the Supreme Court's pronouncement, this Department [1] and indeed the Federal Govenment were of the opinion that the State of Oklahoma held title to that portion of the Askansas riverbed between the cofluence of the Grand River and the Oklahoma-Arkansas border.

Upon the conclusion of the Supreme Court case, Congress, in 1973, appropriated $440,000 annually for 5 years to fund a study (Arkansas riverbed study) to determine the extent and value of each of the Nations' mineral reserves in the Arkansas River from the Grand River to the Oklahoma-Arkansas border. The Bureau of Indian Affairs engaged the services of private appraisers to evaluate the three Indian Nations' coal, oil, gas, sand, and gravel, and other related resources in the riverbed. Pursuant to this study, the total value of the Nation's resources in the Arkansas riverbed was placed at $177 million.

In 1946 Congress, without consultation with the three Indian Nations, authorized the construction of the Corps of Engineers' McClellan-Kerr Arkansas River Navigation System. (See: 60 Stat. 634, 636.) Part of this navigation system includes the Webbers Falls Lock and Dam, the R. S. Kerr Lock and Dam, and the W. D. Mayo Lock and Dam, which were all constructed and are presently being operated on that reach of the Arkansas River to which the Supreme Court later found title to be vested in the three Indian Nations. The primary purpose of this dam system is to aid navigation in the Arkansas River with scondary benefits of hydroelectric power generation, recreation, and fish and wildlife protection.

Since the construction of the Corps of Engineers' McClellan-Kerr project, the nations' sand and gravel deposits within the riverbed have been taken through dredging operations and by streamflow manipulation, which causes the sand and gravel to be washed downstream.

As to the question of whether the United States is legally required to compensate the owner of the bed of a navigable river for damage sustained by reason of the construction and operation of structures necessary for the improvement of navigation, the Supreme Court has stated on many occasions that damage caused by the exercise of the Government's paramount power to improve navigation is incident to the exercise of that power and is not an invasion of property rights for which the United States must make compensation. See *United States* v. *Chicago R.R.,* 312 U.S. 592 (1941); *United States* v. *Grand River Dam Authority,* 363 U.S. 229 (1960). The Government's paramount power with respect to navigation extends to the high water mark of the navigable stream. Therefore, with respect to the three Indian Nations' interest in the lands and minerals below the high water mark of the Arkansas River that have been destroyed by reason of the construction and operation of the Corps' McClellan-Kerr project, I conclude that there is no constitutional requirement for the payment of compensation.[2]

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[1] The Secretary of the Interior, by letter dated March 28, 1908, determined that the Cherokee Nation was not entitled to royalties for the excavation of sand and gravel in that portion of the Arkansas River traversing its reservation because the "equal footing doctrine" vested title to that reach of the riverbed in the State of Oklahoma upon its admission to the Union.

[2] In reaching this conclusion I am well aware that no Federal court has ever refused compensation to an Indian tribe for the United States' use of tribal property in the bed of the navigable river. However, I feel that Justice Marshall's "dictum" in the opinion of *Choctaw Nation* v. *Oklahoma, supra,* would be extremely difficult to overcome if the issue were to go to litigation. In finding that the three Indian Nations held title to that reach of the Arkansas riverbed now under consideration, Justice Marshall commented that: "Indeed, the United States seems to have no present interest in retaining title to the riverbed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce."

Second, there is no support for the position that Congress, with the annual 5-year appropriation of $440,000 for the Arkansas riverbed study, intended to purchase any of the nations' lands and/or minerals in the riverbed.[3]

Although I feel that the three Indian Nations are not legally entitled to compensation for the loss of its natural resources in the riverbed, I believe that, had the Secretary of the Interior realized that title to a portion of the Arkansas riverbed vested in the three Indian Nations, he would have proposed, at the time Congress was considering authorizing the construction of the McClellan-Kerr navigation system, that special legislation be enacted to compensate the nations for the destruction of their property interests in the riverbed.

As support for this position, I cite the following as examples of the enactment of such legislation.

(A) Pursuant to the Flood Control Act of 1944, 58 Stat. 887, Congress authorized the construction of the Oahe Dam and Reservoir project on the Missouri River within the Cheyenne River Indian Reservation. As compensation for the destruction of Cheyenne River Sioux tribe's property interests in the riverbed, Congress ratified an agreement between the tribe and the United States to compensate the tribe for any such loss. (See section II of the Act of September 3, 1954, 68 Stat. 1191.)[4]

(B) In furtherance of the construction of the Oahe Dam and Reservoir project Congress, by the act of September 2, 1958 (72 Stat. 1762), authorized the purchase of the Standing Rock Sioux tribe's title to that portion of the Missouri riverbed within the boundaries of its reservation.[5]

(C) By the Act of July 23, 1946, 60 Stat. 641, Congress authorized the United States Corps of Engineers to acquire those lands within the Fort Berthold Indian Reservation necessary for the construction and operation of the Garrison Dam Reservoir project. The three affiliated tribes owned the bed of the Missouri River at the location of the project and Congress enacted special legislation to compensate for the destruction of its property interests—including the tribes' mineral interests—in the riverbed. (See 63 Stat. 1026.)

In accordance with past history, I firmly believe that, had the Supreme Court's pronouncement in *Cherokee Nation* v. *Oklahoma, supra,* preceded congressional consideration of the construction of the McClellan-Kerr navigation system, the Secretary of the Interior's trust obligation to protect the property interests of Indian tribes would have compelled a request for legislation to compensate the Choctaw, Chickasaw and Cherokee Nations for the destruction of their property interests in the Arkansas riverbed. The fact that the McClellan-Kerr project has been constructed and operating for the past 25 years does not make the enactment of such legislative request any less compelling at this time.

LEO KRULETZ.

Mr. SYNAR. At this time, as you have pointed out Mr. Chairman, we are honored to have as our witness the principal chief of the Cherokee Nation, Mr. Ross Swimmer from Tahlequah, Okla. At this time, if it is agreeable to the Chair, we would like to have him go through the details of where we are on this.

Mr. DANIELSON. Thank you very much, Mr. Synar. Mr. Swimmer, we do have a very lengthy statement from you with exhibits and a summary thereof. We will receive your entire statement plus the

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[3] The Bureau of Indian Affairs' budget justification for the study states the following: The funds will provide the initial capability to define and describe those lands owned by the Choctaw and Chickasaw tribes and the Cherokee Nation, within the Arkansas riverbed, from the Grand River to the Arkansas line, in accordance with the Supreme Court decision in the case entitled *Cherokee Nation, Choctoaw and Chickasaw Nation* v. *State of Oklahoma.* In these decisions, no boundaries were specifically identified * * *. Once the tribal lands have definitely been identified, mineral valuation can be initiated to determine mineral reserves, amounts of gas produced, revenues generated, and evaluation of cash flow assuming participation as working interest owners in producing oil and gas wells. Surface appraisals will be made for all parcels to estimate values of land acquired. *This data will enable the tribes to make technical decisions and enter into real estate management agreements.* [Emphasis added]

[4] While it is true that the Act of September 3, 1954, *supra,* reserved to the tribe title to its mineral interests within the Missouri riverbed future development of these mineral interests were expressly made subject to regulations imposed by the Corps of Engineers. (See section VI of the act of September 3, 1954, 68 Stat. 1191-92).

[5] By the Act of September 2, 1958, *supra,* Congress again declined to purchase the tribe's mineral interests in the riverbed but the act also provided that any future mineral exploration was expressly made subject to regulations imposed by the Corps of Engineers.

summary into the record, but I would appreciate it if you would just give us your highlights of the presentation.

TESTIMONY OF ROSS O. SWIMMER, PRINCIPAL CHIEF, CHEROKEE NATION OF OKLAHOMA

Mr. SWIMMER. I would be very happy to do so, Mr. Chairman. I appreciate this opportunity and I know our time is limited.

Mr. DANIELSON. Would you state for the record the identity of the gentleman accompanying you?

Mr. SWIMMER. Yes. I would like to introduce Mr. Paul Niebell. Paul is one of our legal counsel who has worked on this case for many, many years. He is a sole practitioner in the city of Washington, D.C., and has been in practice for 50 years in Indian law. Paul is a very scholarly gentleman and I have asked him to sit with me to field those questions which might deal with specific issues of law regarding the statute of limitations or other things which might come up.

Mr. DANIELSON. Well, we are glad to have you with us and you are very welcome. You may proceed.

Mr. SWIMMER. Thank you, Mr. Chairman. I appreciate the comments by my Congressman, Mr. Synar. I think he summed up the legislation very well and I will try to be brief.

In order for the committee to have a little bit of an understanding on why we are here, I think a quick review of the history would help. As Congressman Synar said, basically we are asking for a waiver of whatever applicable statute of limitations there might be for us to bring suit in the Court of Claims to determine the liability of the Government for damages for the taking of tribal property.

In the mid-1800's, 1838 to be exact, President Van Buren issued a patent to the Cherokee Nation to certain lands which are now situated in eastern Oklahoma. This was the result of the removal and trade of our property in Georgia, in the Carolinas, and Tennessee. We negotiated in those treaties a patent because we did not want to have to be removed again.

We are one of the few tribes, perhaps the five tribes of eastern Oklahoma, are the only tribes that were even issued patentable title from the United States of America. Such a patentable title carries with it, of course, the protection of the fifth amendment against taking of property without just compensation.

Over a series of legislative acts of Congress, all of the tribal lands were allotted to individual allottees except for a particular strip of land, which is in controversy today, known as the Arkansas riverbed. That land was not allotted by reason of the common law doctrine that the allottee would own to the high water mark of a navigable river as opposed to a nonnavigable river where the allottee would own to the thread of the stream.

Also included in that controversy was an opinion in 1908 by the Secretary of Interior directed to the State of Oklahoma that, in the Secretary's opinion, of course, the State of Oklahoma owned the bed and the banks of the Arkansas riverbed from the confluence of the Grand to Fort Smith, Ark., based on what was known as an equal footing doctrine: When the State was brought into the Union

it was brought in under the same footing as any other State and those States acquired title to the bed and the banks of navigable rivers.

Never before, and I am sure never again in the history of this country, will an Indian tribe be the fee title, patented owner of the bed and banks of a navigable river. It is a case of first impression or only impression, I might say.

As a result of that letter from the Secretary of Interior, we were divested of our title to the bed and the banks of the Arkansas River for a period of years. We during these years believed, sincerely, that we owned the bed and the banks of the Arkansas River.

In 1966 we asked that the Department of Interior bring suit, on our behalf, against the State of Oklahoma to test our title theory. Our request was refused. We then went to the then Governor of the State of Oklahoma, Senator Henry Bellmon, and asked for a special jurisdictional bill from the State of Oklahoma to waive the State's immunity to bring a suit against the State of Oklahoma to challenge our theory.

The legislature passed such a statute. We brought the suit in 1966 and ultimately, in 1970, we were successful in the U.S. Supreme Court in securing our fee simple title, once again, to the bed and the banks of the Arkansas River.

Following that action there was some controversy between two other Indian tribes which own a small portion of that riverbed with us regarding which amounts of the riverbed were owned. That controversy was finally settled by a three judge court in 1973.

Immediately thereafter Congress appropriated $440,000 to have the riverbed appraised. The appraisal was ordered, in effect, to tell us what, in fact, we owned. That appraisal included an appraisal of the sand and gravel, the oil and gas, the coal, the land itself, and the use of the riverbed. Prior to that time, beginning about 1946, the Corps of Engineers began work on what became known as the McClellan-Kerr Navigation Channel. They dredged this portion of the Arkansas River. They piled the sand from the dredging up on the banks of the river. Subsequently it was covered with growth and what have you and basically made unusable.

The opinion of the appraisers was that we had lost about $8½ million worth of sand and gravel. We also lost some coal on top of which three dams were built. And, we had suffered some considerable damage.

The Secretary of Interior at that time, in 1975, was satisfied that our case was settled, that there was no further controversy, that we had won our title against the State of Oklahoma and that the U.S. Government was now using our property. The Secretary advised us that we should come forward with an agreement and negotiate some kind of a settlement with the Government, that they would pay us for what they had taken of our property.

Because of much conflict occurring in the Government in 1975, 1976, and 1977 during the turmoil of changes of Secretaries and what have you, as we would come forth with these proposed settlement agreements, we would get various opinions saying on the one hand that "yes, you can settle this particular issue, but we need an act of Congress granting that authority." By the time we would come to the hearing they would reverse themselves and they would

say "no, you do not need an act of Congress, we have the right to settle."

As late as 1978, I was furnished an agreement drawn by the Solicitor and the Secretary of Interior which was very satisfactory to myself and to my tribal council. I was asked to sign that agreement. I was advised by the Assistant Secretary that that agreement would be executed and that we would come to Congress and ask for an appropriation to satisfy the amount requested.

Mr. DANIELSON. May I interrupt? Is that the exhibit D in your statement?

Mr. SWIMMER. Yes, sir. Unfortunately, we signed the agreement, however, it was never signed by the Secretary. They reneged once again, and as I understood, under pressure from OMB, they simply said, "our hands are tied and we really can not go any further. We also feel that there is a serious question as to the legal liability, not necessarily based on fair and honorable dealing, but strictly the taking issue as to whether the Corps of Engineers and the U.S. Government has a navigational servitude that would allow the Government to use your property for whatever purpose it so chooses as long as it is for navigation and that because of this issue we do not feel that we can go forward with this negotiated settlement. We are going to back up and offer advice to you." Interior's advice to us was, "you better go to Congress and get a jurisdictional act passed so that you can bring a suit against the U.S. Government and get this thing settled in court and let the court make the decision."

We introduced that legislation last year on the advice of the Department of Interior. It was late in the session, as the Congressman mentioned, and we did not get the hearings on it. Congressman Synar has recently reintroduced the legislation this year and it has been introduced in the Senate by Senators Don Nickles and David Boren of Oklahoma.

We feel as if our only alternative after what we have been through so far is to go back to court. We feel a little put upon but we also feel that we might as well get started now and start the legal battle. But we cannot go to court under what we consider to be the present law of the situation regarding the statute of limitations and what have you. We feel we need this jurisdictional bill in order to allow us to go to court and address this particular claim against the Government regarding the Arkansas riverbed.

The railroad case is similar only in that it was a taking by act of Congress in 1906 where they simply waived our reversionary right and turned over the abandoned railroad stations to town sites without compensating the tribe.

Mr. Niebell has litigated two cases involving very similar issues with the Seminoles and the Creeks. These cases were settled in 1974 in favor of the Indian tribes. We feel, based on that favorable judicial determination, that it would be timely for us to bring our case at this time.

[The prepared statement of Mr. Swimmer follows:]

SUMMARY OF THE TESTIMONY OF ROSS O. SWIMMER, PRINCIPAL CHIEF, CHEROKEE NATION OF OKLAHOMA

H.R. 2329 authorizes the Cherokee Nation to sue the United States Government to recover the value of property owned by the nation which was taken by the United States Government, through the Corps of Engineers and Act of Congress, without the concurrence of and without compensation to the nation.

Through treaties of 1817, 1828, 1833, and 1835, the Cherokee Nation was granted lands west of the Mississippi River in fee simple by patent from the United States in exchange for the tribe's homelands east of the Mississippi. Included in the boundaries of the western lands was a portion of the Arkansas River, a navigable stream flowing for 96 miles across the nation's southern perimeter.

Through various treaties and acts of Congress, the Cherokee Nation was divested of most of its lands in the late 1800's. The nation continued, however, to retain the Arkansas River in trust for the Cherokee people. In 1908, shortly after Oklahoma entered the Union, the Secretary of Interior opined in a letter to the State of Oklahoma, that title to the riverbed was vested in the State by virtue of the "equal footing doctrine". Ownership of the bed and banks of the Arkansas River was not settled until 1970, when the United States Supreme Court ruled, in *Choctaw Nation* v. *Oklahoma,* 379 U.S. 620 (1970), that the Cherokee, Choctaw and Chickasaw Nations owned the riverbed.

During the interim, when ownership was in dispute, the U.S. Army, Corps of Engineers removed several million cubic yards of sand, gravel, coal and other resources from the riverbed as it constructed the Arkansas River Navigation System. The resources were sold or destroyed without the approval of the tribe and without compensation to the tribe.

In somewhat related fashion, lands which the tribe ceded for use, during the westward expansion, to the railroads as sites for station houses were removed from tribal ownership without the approval of or compensation to the tribe. In ceding the lands to the railroad companies, the Cherokee Nation retained the right of reversion should the lands be abandoned. In 1906, the nation was stripped of this reversionary right by act of Congress, wherein title vesting ownership of the lands was converted to the municipalities in which the station houses were situated.

We believe that, in taking tribal property without just compensation, the United States, through the Department of Interior, has abrogated its trust responsibility to the Cherokee Nation. By allowing the Corps of Engineers to continue to take resources from the bed and banks of the Arkansas River, that abrogation reigns unchecked.

Because the Department of Interior has repeatedly declined to negotiate a settlement for the destruction and loss of our property, our only recourse is to seek judicial redress. The injustice of our having been "relieved" of millions of dollars of tribally-owned assets can only be corrected if we obtain Congressional authorization to contest the issue in the courts.

Mr. Chairman and members of the committee, thank you for the opportunity of appearing before you and presenting the position of the Cherokee Nation regarding H.R. 2329.

Before commenting on the bill directly, we believe it is important to review the history preceding the bill. The history begins with the first of several treaties which ultimately caused the removal of Cherokees from their homelands east of the Mississippi to a location west of the Mississippi to be known as "Indian Territory".

In 1817, a treaty, 7 Stat. 156, Proclamation, December 26, 1817, was signed. This treaty, essentially, called for the Cherokees to give up their aboriginal title to all lands claimed by them east of the Mississippi River for equivalent title to land west of the river. Later, treaties of 1828, 7 Stat. 311; 1833, 7 Stat. 414; and 1835, 7 Stat. 478 called for the land west of the Mississippi River to be granted in fee simple by patent from the United States. This was done over the signature of President Van Buren. The land consisted of approximately 14 million acres and covered what is now the northeastern quadrant of the State of Oklahoma. Included in the patent was the Arkansas River, which at that time was a navigable stream as far north as the city of Muskogee. Its length runs approximately 96 miles from Muskogee southeastward to the Arkansas line. (See attached map entered as exhibit "A".)

Through various acts of Congress near the end of the 19th century, all of the Cherokee lands were ordered allotted or sold at public sale. However, the riverbed land in the Arkansas River remained under tribal ownership since allottees along a navigable stream received title only to the high water mark.

A dispute arose shortly after statehood of Oklahoma in 1907, wherein our ownership of the riverbed was questioned. In response, the Secretary of Interior in 1908,

by letter to the State of Oklahoma, stated that the title to the riverbed was vested in the State of Oklahoma by virtue of the "Equal Footing Doctrine". Since other States acquired title to navigable rivers when those States were brought into the Union, it followed that Oklahoma also acquired title to its navigable rivers, according to the Secretary. However, never before nor since has a State been carved out of territory owned by an Indian tribe in fee simple.

The concept of State ownership was affirmed by various Oklahoma Supreme Court cases from 1908 through the 1940's. The Cherokee Nation had its hands tied. Since the State was a sovereign, it was immune from suit. For many years we asserted title to the riverbed but were unable to get into court. It was not until United States Senator Henry Bellmon, then Governor of Oklahoma, agreed to an authorization bill passed by the Oklahoma legislature that we were able to bring a quiet title suit against the State.

In 1966, the Cherokees filed their suit (397 U.S. 620, 90 S. Ct. 1328) and won judgment on April 27, 1970, in the United States Supreme Court. The judgment was to settle the issue of ownership for all time. No where was this more eloquently stated than by Justice William O. Douglas in his concurring opinion wherein he states, "Only the continuation of a regime of discrimination against these people, which long plagued the relations between the races, can now deny them this just claim".

It was obvious the Supreme Court thought it had done its job. Congress also apparently thought the question was settled. In 1973, 1974, and 1975, Congress appropriated $440,000, and ordered the Department of Interior to do a complete appraisal and evaluation of our property. This was completed in 1975 and accepted by the tribe.

Along with the valuation of our land and minerals, the appraisers told congress that we had lost over $8.5 million in sand, gravel and coal as a direct result of the Corps of Engineers' constructing the Arkansas River Navigation System. In 1976 we were invited by the Secretary of Interior to negotiate a settlement for our loss. We were also advised that it would be in the best interest of the United States if we would sell all of our mineral interest to the Government so that future production would not conflict with the Government's use of the navigation way. As a consequence, we drafted an agreement, with the help of the Solicitor for Interior, that would settle all of the issues of our ownership. Upon submission of the agreement to the Department of Interior, we were advised by a new Secretary of Interior that he had no authority to enter into the agreement and that we must have congressional approval before the agreement could be signed.

Again, with Interior's help, our congressional delegation drafted Senate Bill 660 and companion House Bill 4377, 95th Congress, 1st Session. Incredibly, at the hearings on these bills, the representative for the Department of Interior, Mr. Raymond Butler, testified that the legislation was not needed after all and that the Department would prefer negotiating a settlement with the tribe which would then be referred to Congress for any appropriation necessary. We were later advised that the turn-around was the result of pressure from the Office of Management and Budget which feared the impact to the budget of a congressionally-mandated settlement with the tribe. In any event, the legislation was not passed.

The following year I was personally contacted by the Assistant Secretary for Indian Affairs regarding a proposed agreement. He advised me that he would be sending an agreement for my signature which would also require tribal council approval. (See attached letter, labeled exhibit "B".) The proposed agreement was received and signed by myself and council approval was given. (See attached resolution, labeled exhibit "C".) It was returned to the Assistant Secretary for signature. Again, after the agreement had been held for several months, we were advised that the Department was not going to sign the agreement. This decision also was apparently made after consultation with the Office of Management and Budget. A copy of the agreement is attached as exhibit "D".

From 1975 when our loss was finally determined until today, we have been at the mercy of our trustee, the U.S. Government acting through the Department of Interior. Had we known what was going to happen, we would immediately have gone into the Court of Claims, established our loss, and presented our judgment for payment. It was only after assurances had been given the tribe and the congressional sponsors of enabling legislation that the Department of Interior possessed full authority to negotiate an agreement that would compensate the tribe for its loss that we agreed to go to the negotiated-settlement route.

Recent history indicates that the Department of Interior, acting as trustee for our tribe via the Bureau of Indian Affairs, is still doing nothing to protect our interest in the riverbed. In October of 1980 the Army Corps of Engineers compiled and circulated an "Interim Feasibility Report, W.D. Mayo Lock and Dam 14". The report was

to advise all interested parties of the Corps' intent to build an additional powerhead at this lock and dam which is situated on Cherokee land. In the process, the Corps estimates removing 390,0000 cubic yards of material. The tribe was never informed of this project but the Bureau of Indian Affairs was. The only comment by the Bureau of Indian Affairs regarding our ownership of the riverbed was, "The possibility of conflict in ownership exists. This office has no further comment to submit".

It is obvious to us what the Supreme Court of the United States meant when it held that we owned the bed and banks of the Arkansas River in fee simple absolute by patent from the United States of America. The Corps apparently believes it meant we own the riverbed subject to whatever they want to do with it. The Department of Interior believes it was simply a hollow victory without meaning. The Office of Management and Budget doesn't care what it means as long as it doesn't impact the budget.

Never before in the history of this great country has an Indian tribe under the trusteeship of the United States Government been denied payment for taking of its property whether by outsiders or by the Government. Never before had the judgment of the Supreme Court been abused as badly as in this case. Even today sand and gravel as well as minerals are being taken or destroyed by action of the Corps of Engineers. Private companies are trespassing on the river with impunity. We have had to take legal action against these trespassers but the Bureau of Indian Affairs has offered no assistance.

We believe that we must go into court once again and fight the battle over. But we cannot sue the United State without your permission. The other trespassers can and are being sued. Only the largest and most flagrant trespasser, the United States itself, cannot be sued without the congressional authority we are asking you for today. We heartily protest the need for what will surely be a long, arduous legal battle but we sincerely believe it is the only course left to us. Since the date on which we were asked by Interior to sign a settlement agreement, we have lost an additional $3 to $4 million a year from revenues that could have been generated from such a settlement. We have also deferred development of our mineral resources, having been advised of the desire by the Interior Department to acquire our mineral estate.

H.R. 2329 allows us to go into court and seek specific damages for the taking of our property in two instances. The first is the taking within the Arkansas Riverbed. The second is the taking of railroad station grounds by operation of section 14 of the 1906 Act of Congress which converted our reversionary rights to those station grounds into a title vesting ownershp in municipalities where these stations were situated. Two cases similar to ours involving the Creek and Seminole tribes have been decided. Due to other ligitation pending, this is our first opportunity to seek a jurisdictional bill which would allow us to set forth our claim regarding these railroad stations.

If the United States has a defense to either of these claims, we should be able to hear these defenses in a court of law where we can also present evidence of our claim. If we are successful, we should be paid and the matter settled just as Justice Douglas stated. If we lose, we have no less than we have today.

Since Congress and the Department of Interior have failed in the past to respond to our efforts to secure redress for loss of our tribal assets, we have no other alternative than to seek justice again in the courts of the United States. Unfortunately, we must seek this redress against our own trustee, the United States of America. We cannot do that unless this bill and the companion bill in the Senate are passed.

The tribal government of the Cherokee Nation has worked long and hard to establish our ownership of the bed and banks of the Arkansas River. Out tribal government is strong and active and is in the process of establishing numerous programs and projects that will benefit our people by supplementing the limited services available to them through various governmental agencies.

Many of our people are poor. Even though Cherokees are a small percentage of the total population within the area once known as the Cherokee Nation, a larger percentage of our population is below the poverty level. Specifically, about 50 percent of the Cherokee families have income below poverty level. As many as 70 percent of the unemployed within the area are Indian. Many available services offered by State and Federal agencies and by our own government never reach the ones who need services the most. Over 80 percent of the Cherokees live in rural areas. Their isolation compounds the problems of poverty, unemployment, substandard housing, health care and education.

The Cherokee tribal government has formulated plans which seek to alleviate the problems of the Cherokees through development of tribal resources. We are now working on programs involving adult education, transportation, training for jobs

and others. We have also emphasized economic development. Through investment in existing industry and by attracting new industry to the areas, we are significantly aiding in the creation of jobs and general stimulation of the economy in northeastern Oklahoma. The money we would have received from the sale of the sand and gravel taken by the government would have gone a long way toward helping us achieve the economic self-sufficiency of our people.

Ross O. Swimmer,
Principal Chief, Cherokee Nation of Oklahoma.

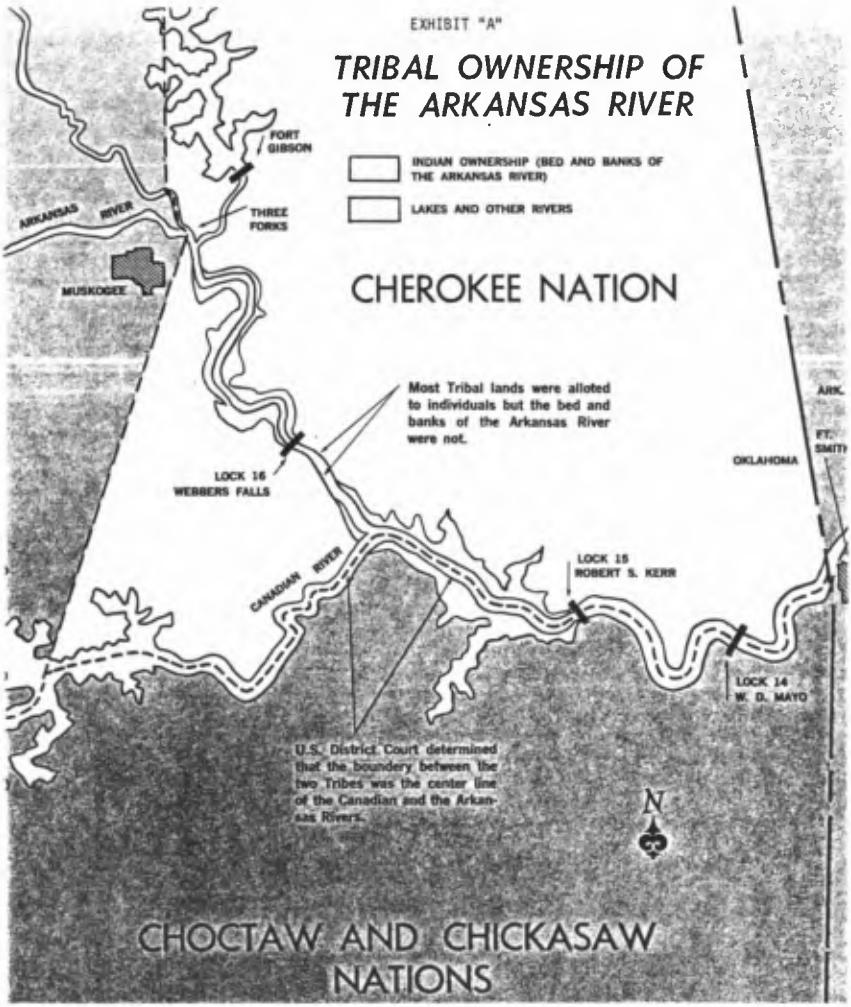
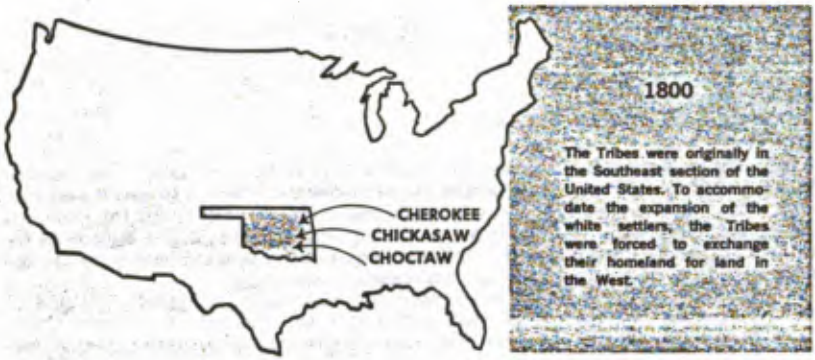


EXHIBIT "A"
TRIBAL OWNERSHIP OF THE ARKANSAS RIVER
INDIAN OWNERSHIP (BED AND BANKS OF THE ARKANSAS RIVER)
LAKES AND OTHER RIVERS
FORT GIBSON
THREE FORKS
ARKANSAS RIVER
MUSKOGEE
CHEROKEE NATION
Most Tribal lands were alloted to individuals but the bed and banks of the Arkansas River were not.
LOCK 16 WEBBERS FALLS
CANADIAN RIVER
LOCK 15 ROBERT S. KERR
LOCK 14 W. D. MAYO
OKLAHOMA
ARK.
FT. SMITH
U.S. District Court determined that the boundery between the two Tribes was the center line of the Canadian and the Arkansas Rivers.
N
CHOCTAW AND CHICKASAW NATIONS

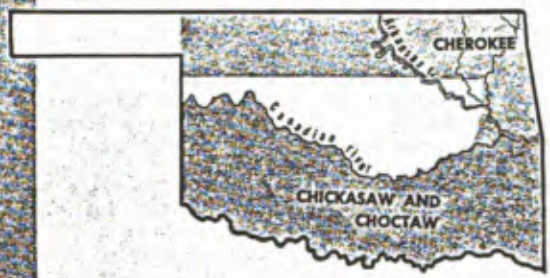


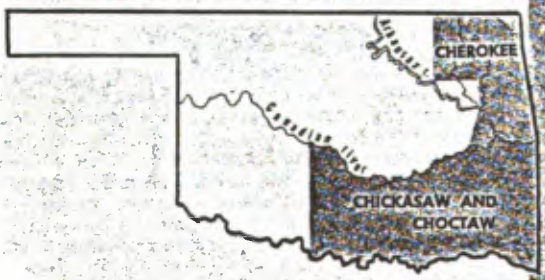
1800

The Tribes were originally in the Southeast section of the United States. To accommodate the expansion of the white settlers, the Tribes were forced to exchange their homeland for land in the West.

1860

The treaties of New Echota and Dancing Rabbit Creek gave the Cherokees and Choctaws vast areas of land in what is now Oklahoma. Other treaties of 1837 and 1855 gave the Chickasaw Nation a one-fourth undivided interest in the lands of the Choctaws.





1906

After the Civil War, the government took away the western part of the Tribes' lands to give to the Plains Indians and eventually to the white settlers. In 1906, the Allotment Act caused the tribal lands to be divided among individual members. However, the bed and banks of the Arkansas River never were alloted and remained the property of the Tribes.

EXHIBIT B

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., November 4, 1977.

Mr. ROSS SWIMMER,
Principal Chief, Cherokee Nation,
Tahlequah, Okla.

DEAR CHIEF SWIMMER: Congressional hearings have been completed on legislation (S. 660 and H.R. 4377) to authorize the Secretary of the Interior to execute an agreement with the Choctaw, Chickasaw and Cherokee Indian nations for the "use, lease, and/or purchase" of any of the three nation's property rights in the Arkansas riverbed. As originally introduced, the proposed legislation intended that such an agreement would not be binding without congressional approval.

As you know, this Department opposed the enactment of both S. 660 and H.R. 4377 because the Secretary is already vested with the authority to execute the type of agreement envisioned by the legislation. Accordingly, both the Senate Select Committee on Indian Affairs and the House Subcommittee on Indian Affairs and Public Lands were advised that the Secretary intended to negotiate with the Principal Chiefs of the Choctaw and Cherokee Nations and the governor of the Chickasaw nation in an effort to arrive at an acceptable agreement for Congressional ratification.[1]

Other oppostion to the legislation basically focused on two points: (a) the establishment of an undesirable precedent in singling out a special class (or classes) of landowners to compensate for the loss or use of their property interests in the bed of a river that is allegedly subject to an easement for navigation[2] and (b) the authority of the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation to unilaterally convey tribal property.[3]

With regard to the Corps' opposition to the legislation, I agree with the position expressed by you at the Congressional hearings that the applicability of the Doctrine of Navigational Servitude is questionable in this instance because a Federal court has never refused compensation to an Indian tribe for the United States' use of tribal property in the bed of a navigable river. However, I feel that Justice Marshall's "dictum" in the opinion of *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970), would be difficult to overcome if the issue were to go to litigation.[4] In addition, the Corps of Engineers emphasized that the nation's property interests in the riverbed have not been "taken" because each nation is still free to develop much of its mineral reserves so long as such development does not interfere with the operation of the projects. The Corps has also pointed out that, at no time since the 1970 decision in *Choctaw Nation* v. *Oklahoma, supra,* have the nations advised the Corps of their desire to develop the tribal mineral reserves in the riverbed.

Lastly, you no doubt are aware that the authority of the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation to execute an agreement to convey tribal property has been challenged and is the subject of recent suits filed in the United States District Court for the District of Columbia, entitled *Noel Morris, et al.* v. *Cecil Andrus, Secretary of the Interior, et al.*, Civil No. 77-1667, and *Darias Cravatt, et al.* v. *Cecil Andrus, Secretary of the Interior, et al.*, Civil No. 77-1664. In these two lawsuits, the court has been requested to issue an order restraining the Secretary of the Interior from approving the disposition "in any manner" of the tribal property of the Choctaw and Chickasaw Nations during the pendency of the litigation. The factual background necessary to respond to these lawsuits is still being prepared in this Bureau's Muskogee area office and therefore this Department has not yet taken a position with respect to the issues raised by the plaintiffs. Accordingly, I am proposing to the principal chief of the Choctaw Nation and the

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[1] As you know, a representative of this Bureau has met with you, Governor James and Chief Gardner on three occasions to discuss the terms and conditions of the type of agreement contemplated by the legislation.

[2] Advanced by the Corps of Engineers because, in the reach of the Arkansas River to which the three nations hold title, the Corps, with the consent of Congress, has constructed portions of the McClellan-Kerr Arkansas River Navigation System (i.e., the Webbers Falls Lock and Dam, the Robert S. Kerr Lock and Dam, and the W. D. Mayo Lock and Dam).

[3] Advanced by the National Indian Youth Council and others.

[4] In finding that the Choctaw, Cherokee and Chickasaw Nations held title to that reach of the bed of the Arkansas River that is the subject of the legislation, Justice Marshall commented that: "Indeed, the United States seems to have no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce."

governor of the Chickasaw Nation that we temporarily suspend the execution of an agreement involving those nations' property interests in the Arkansas River until such time as representatives of this Department and the Department of Justice have had an opportunity to review the background of the pending litigation and decide on the proper manner in which to proceed. However, I continue to stand ready to negotiate and execute an agreement with the Cherokee Nation involving its property interests in the bed of the Arkansas River.

In this respect, I propose the following:

Irrespective of the applicability of the Doctrine of Navigational Servitude, I note that many Congressional committee members appeared to be concerned with the fact that the United States—the trustee for the three nations—has benefited from the use of tribal assets while at the same time it has taken or destroyed certain of those assets without compensation being paid the tribes. I too share this concern. The Arkansas riverbed appraisal reports show that the Cherokee Nation's tribal assets actually being taken and/or destroyed as a result of the construction and operation of the Corps' projects are its sand and gravel deposits—the appraised value of which is approximately $21,346,762—and the nation's coal reserves located under the W. D. Mayo Lock and Dam—the appraised value of which is approximately $265,000.

Pending further Congressional action on S. 660 and H.R. 4377, I now propose that future negotiations now focus on an agreement that would compensate the Cherokee Nation for the value of its tribal mineral deposits in the riverbed that have been taken or will be destroyed by reason of the construction and operation of the Corps' projects. I base this proposal on possible adverse congressional reaction to an agreement to purchase all of the mineral depostis in the riverbed at a time when there appears to be no apparent need for such reserves and on the fact that there still exists a possibility that the nation, as lessor, may be able to continue to develop some of their mineral reserves in the future. It is my opinion that an agreement executed with the Cherokee Nation to compensate for the United States' taking of tribal assets may be received more favorably in Congress than an agreement for the United States to purchase mineral deposits for which there is no apparent or immediate need.

You are aware that the Secretary of the Interior is required to submit any such agreement to the Office of Management and Budget and thereafter to Congress for ratification before it becomes effective.

Of course, if Congress enacts either S. 660 or H.R. 4377, then the payments made pursuant to that legislation will be offset by the amount paid pursuant to this proposal.

I emphasize that this is only a proposal for your consideration and is not intended to reflect a final disposition of the matter by this Bureau. Accordingly, I request that you review this proposal and provide me with your comments and recommendation at your convenience.

Sincerely,

FORREST J. GERARD,
Assistant Secretary for Indian Affairs.

EXHIBIT C

RESOLUTION OF THE CHEROKEE NATION

Whereas, the people of the Cherokee Nation, placing trust and confidence in the leadership of the principal chief of the Cherokee Nation, authorize the principal chief to negotiate with the Secretary of the Interior for the compensation for the Cherokee Nation's interest in the sand and gravel contained in the Arkansas River from Three Forks to the Arkansas line, and

Whereas, the Cherokee Nation accepts the Bureau of Indian Affairs appraisal value of $8,453,818.88 as the fair market value of the Cherokee Nation's interest in the sand and gravel in the Arkansas River from Three Forks to the Arkansas line, and

Whereas, the principal chief of the Cherokee Nation has entered into an agreement with the principal chief of the Choctaw Nation and the Governor of the Chickasaw Nation, and,

Whereas, the three chiefs have jointly entered into an agreement with the Secretary of the Interior on March 10, 1976, to begin negotiations on the settlement of the Arkansas Riverbed Case, Now, therefore, be it,

Resolved, That the council of the Cherokee Nation by passage of this resolution hereby fully supports the principal chief in negotiations on the settlement of the Arkansas Riverbed Case.

Approved by the council of the Cherokee Nation this 14th day of January 1978.

R. PERRY WHEELER,
President, Council of the Cherokee Nation.

Attest: Gary D. Chapman, Secretary/Treasurer, Cherokee Nation of Oklahoma.

EXHIBIT D

AGREEMENT

This agreement, made and entered into this —— day of ————, 1978, by and between the Assistant Secretary of the Interior, Indian Affairs, acting on behalf of the Secretary of the Interior, and the principal chief and members of the general council of the Cherokee Nation, acting for the members of the Cherokee Nation in accordance with the authority granted by and under the Constitution and By-Laws of the Cherokee Nation.

Whereas, the United States Supreme Court in the case entitled, *Cherokee, Choctaw and Chickasaw Nation* v. *State of Oklahoma,* 397 U.S. 620 (1969), considered the question of the ownership of the bed of the navigable portion of the Arkansas River in the State of Oklahoma and held, *inter alia,* that, with respect to the stretch of the river between the confluence of the Grand and Canadian Rivers, the Cherokee Nation alone holds fee title to the riverbed.[1]

Whereas, the Congress of the United States has, by the Department of the Interior Appropriation Acts for the fiscal years 1973, 1974, and 1975 (86 Stat. 509, 87 Stat. 431, and 88 Stat. 809), authorized the funding of a study (hereinafter referred to as the Arkansas riverbed study) to determine the extent and value of the Cherokee Nation's mineral reserves—including sand and gravel deposits—in the Arkansas riverbed between the confluence of the Grand and Canadian Rivers.[2] The Arkansas riverbed study has been completed and the appraised value of the Cherokee Nation's sand and gravel reserves has been accepted by its principal chief, acting for the members of the Cherokee Nation in accordance with the authority granted by and under the Constitution and By-Laws of the Cherokee Nation. A copy of the Cherokee Nation's approval—by resolution—of the appraised valuation of sand and gravel deposits is attached hereto as exhibit A and made a part hereof by reference.

Whereas, in 1946, Congress authorized the construction of the Corps of Engineers' McClellan-Kerr Arkansas River Navigation System. (60 Stat. 634, 636). Part of this navigation system includes the Webbers Falls Lock and Dam, the R. S. Kerr Lock and Dam, and the W. D. Mayo Lock and Dam; these projects are constructed on that reach of the Arkansas River to which the Supreme Court later found title to be vested in the Cherokee, Choctaw, and Chickasaw Nations.[3] The primary purpose of this dam system is to aid navigation in the Arkansas River with secondary benefits of hydro-electric power generation, recreation, and fish and wildlife.

Whereas, since the construction of the Corps of Engineers' Webbers Falls Lock and Dam, the sand and gravel deposits within the reach of the Arkansas River between the confluence of the Grand and Canadian Rivers to which the Cherokee nation holds fee title, has been taken by the Corps of Engineers, an agency of the United States, by actual removal thereof through dredging operations and also by streamflow manipulation causing the sand and gravel to be washed downstream. The present day royalty value of the Cherokee nation's sand and gravel deposits in this reach of the river has been appraised at $8,453,818.88. The loss of this tribal asset has not been compensated by the United States.

Whereas, for the destruction of the Cherokee nation's sand and gravel deposits in the bed of the Arkansas River between the confluence of the Grand and Canadian

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[1] The Court further held that, below the Canadian River to the Oklahoma-Arkansas border, the Choctaw, Chickasaw, and Cherokee Nations hold fee title to the Arkansas riverbed. In a subsequent suit entitled, *Choctaw and Chickasaw Nation* v. *Cherokee Nation,* 393 F. Supp. 224 (E.D. Okla., 1975), a three judge district court found that the Cherokee Nation owns fee simple title to the north half of the natural bed of the Arkansas River from its confluence with the Canadian River to the Oklahoma-Arkansas border and the Choctaw and Chickasaw Nations jointly own fee simple title to the south half of the bed in the same stretch of the river.

[2] The Arkansas riverbed study also determined the extent and value of the Cherokee, Choctaw, and Chickasaw nation's mineral reserves from the Canadian River to the Oklahoma-Arkansas border.

[3] See n.1, supra.

Rivers, the Bureau of Indian Affairs has determined that the sum of $8,453,818.88 is an appropriate sum to be paid the Cherokee nation for its loss.

Now, therefore, It is agreed between the parties hereto as follows:

It is mutually understood and agreed that the money appropriated by Congress and accepted by the Cherokee nation will be in full satisfaction of all damages sustained to the nation's sand and gravel deposits in the Arkansas riverbed between the Grand and Canadian Rivers as a result of both past and future project operations by the Corps of Engineers.

It is also mutually understood and agreed that any congressional legislation authorizing and/or directing the Secretary of the Interior to execute an agreement with the Cherokee Nation for the purchase and/or lease of the nation's property interests in the Arkansas riverbed will be offset by the amount paid pursuant to this agreement.

It is further mutually understood that, to become a binding and effective document, this agreement is subject to the appropriation of required funds.

Ross O. SWIMMER,
Principal Chief.

Mr. DANIELSON. Thank you very much, Chief Swimmer. I note from the bill that has been introduced by Mr. Synar that you seek to receive jurisdiction to have this matter considered either by the Court of Claims or the U.S. District Court for the Eastern District for Oklahoma. Has anything been done to decide where you would, in fact, bring the action?

Mr. SWIMMER. We would be very satisfied to bring the action in the Court of Claims. We had thought at the time, last year when the bill was introduced, that, because the issue is basically one of a local nature the U.S. District Court in Muskogee, Okla., might be more in tune with the facts of the situation. We have no objection at all to bringing the case in the Court of Claims and limiting our jurisdiction to that.

Mr. DANIELSON. I have no feeling personally one way or another, I was just wondering if there was some reason behind it that I do not detect.

Mr. SWIMMER. There is not.

Mr. DANIELSON. OK, how about you, sir? You are counsel here and I am sure you have been delving into this for a long time. Do you have any added comments you would like to make?

Mr. NIEBELL. No, Mr. Chairman, I think he has covered it very well. I wanted to say, though, that I started the railroad suits for the Creek and Seminole Indians way back in 1930 and it took me until 1974 to get a final judgement against the United States. At the time the Indian Claims Commission Act was passed, we had 5 years in which to file our suits, but at the time, in 1943, I took these cases to the Supreme Court of the United States and they said go back and sue the railroads.

Well, we went back there and we were struck with the principle of the plenary power of Congress over Indian affairs, so we were stuck there. So, in 1951, I filed the suits again. Mind you, at that time, there was no favorable decision and I presume that the counsel for the Cherokees decided that there was nothing to be gained by the tribe in filing a similar suit. But I continued to persist in the matter and in 1951 I filed these cases again before the Indian Claims Commission.

I lost it before the Commission in 1972 again on the ground of res judicata. Then finally, I appealed to the Court of Claims and they upheld our claim. So, it took me 50 years to settle these cases.

Mr. DANIELSON. It is a good thing you are vigorous.

Mr. NIEBELL. Certainly persistent.

Mr. DANIELSON. Well, if at first you don't succeed try, try again. I guess we can say you have done that. Mr. Synar will be back very shortly. Mr. McMahon, did you have any questions on this because Mr. Kindness could not come back and I know Mr. Morehead could not.

Mr. MCMAHON. Thank you, Mr. Chairman. No questions.

Mr. DANIELSON. Will you gentleman please remain in attendance and we can call up the other witness from the Department of Justice. Mr. Synar will be back very shortly and then let me go and vote. We have to share the honors here.

So, our next witness will be then the witness from the Department of Justice. Please come forward, sir.

Mr. LIOTTA. With your permission, Mr. Chairman, may I have Mr. Beall, the chief of our Indian Claims Section, accompany me?

Mr. DANIELSON. Surely. Surely. Of course. You are Anthony Liotta, Deputy Assistant Attorney General. Do you have any further identifying designation or is that it?

Mr. LIOTTA. No, sir, that is it.

Mr. DANIELSON. You are in civil litigation.

Mr. LIOTTA. I am in the Land and Natural Resources Division.

Mr. DANIELSON. Land and Natural Resources. And your associate, sir?

Mr. LIOTTA. Is a section chief also in the Land and Natural Resources Division.

Mr. DANIELSON. Well, Mr. Synar, you are in charge. I am going to go and do the same thing you did and I will be back.

Mr. SYNAR [presiding]. Before you start I would like to enter into the record that on November 18, 1981, the Department of the Interior was invited to attend this hearing this morning with respect to H.R. 2329 and the committee was informed only on December 7 that the Justice Department would testify instead of the Interior Department. I add that to the record because I find it of great interest.

Go ahead.

TESTIMONY OF ANTHONY LIOTTA, DEPUTY ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION

Mr. LIOTTA. Mr. Chairman and members of the committee, as indicated, my name is Anthony C. Liotta. I am a deputy assistant attorney general for the Land and Natural Resources Division. My remarks concerning H.R. 2329 will be very brief.

As the committee is aware, H.R. 2329 would waive the statute of limitations found in title 25, United States Code, sections 2401 and 2501 as well as that contained in section 12 of the Indian Claims Commission Act (25 U.S.C. 70k) with respect to certain claims of the Cherokee Nation.

The Department of Justice opposes enactment of H.R. 2329. With the enactment of the Indian Claims Commission Act of 1946, the Congress established an unambiguous statutory policy that all tribal claims which arose prior to August 13, 1946, were to be filed within 5 years, that no claim so presented may thereafter be sub-

mitted to any court or administrative agency for consideration and that no such claim will thereafter be entertained by Congress (25 U.S.C. 70k). As this Department has recommended in the past, exceptions to that policy should not be made on a piecemeal basis.

Moreover, I would like to emphasize that litigation by the Cherokee Indians in the Court of Claims, under jurisdictional legislation pertaining specifically to these Cherokee Indians and under the general jurisdiction of the Indian Claims Commission Act, was conducted in numerous cases for more than 70 years. Both of these acts state clearly that the policy of Congress is to foreclose further litigation of claims which could have been stated within its purview.

A list of jurisdictional acts and the decisions entered thereunder relative to the claims of these Cherokee Indians has been provided to the committee. It appears that the Cherokees were awarded a total of $16,152,452.04 in the cases involved.

We believe, therefore, that the Cherokee Indians could have had their day in court. They have not lacked adequate legal counsel and could have brought their claims within the period allowed by the statute of limitations.

We do not believe that legislation affording one group of Indians a special privilege that is denied to other groups is warranted. Therefore, we oppose enactment of H.R. 2329.

That concludes my statement, Mr. Chairman.

[The prepared statement of Mr. Liotta follows:]

PREPARED STATEMENT OF ANTHONY C. LIOTTA, DEPUTY ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION

Mr. Chairman, members of the committee: My name is Anthony C. Liotta. I am a Deputy Assistant Attorney General for the Land and Natural Resources Division. My remarks concerning H.R. 2329 will be very brief.

As the committee is aware, H.R. 2329 would waive the statute of limitations found in 25 U.S.C. § 2401 and § 2501 as well as that contained in section 12 of the Indian Claims Commission Act (25 U.S.C. § 70k) with respect to certain claims of the Cherokee Nation.

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Moreover, I would like to emphasize that litigation by Cherokee Indians in the Court of Claims under jurisdictional legislation pertaining specifically to these Cherokee Indians,[1] and the general jurisdiction of the Indian Claims Commission Act was conducted in numerous cases for more than 70 years. Both of these acts state clearly that the policy of Congress is to foreclose futher litigation of claims which could have been stated within its purview.

A list of jurisdictional acts and the decisions entered thereunder, relative to the claims of these Cherokee Indians has been provided to the committee. (See attachment). It appears the Cherokee were awarded a total of $16,152,452.04 in the cases involved.

We believe, therefore, that the Cherokee Indians could have had their day in court. They have not lacked adequate legal counsel and could have brought their claims within the period allowed by the statute of limitations.

[1] Act of April 25, 1932, 47 Stat. 137.

We do not believe that legislation affording one group of Indians a special privilege that is denied to other groups is warranted. Therefore we oppose enactment of H.R. 2329.

CLAIMS AGAINST THE UNITED STATES, BROUGHT BY CHEROKEE INDIANS, COMPLETED LITIGATION

Act of February 25, 1889, 25 Stat. 694. *Western Cherokee Indians* v. *United States,* 27 Ct. Cl.1 (1891), *aff'd* 148 U.S. 427 (1893).

Act of March 19, 1924, 47 Stat. 137, as amended. *Cherokee Nation* v. *United States,* 92 Ct. Cl. 262 (1941).

Act of April 25, 1932, 47 Stat. 137. *Eastern or Emigrant Cherokee* v. *United States,* 82 Ct. Cl. 180 (1935), *cert. denied,* 299 U.S. 551; *Eastern or Emigrant Cherokees and Western Old Settler Cherokee* v. *United States,* 88 Ct. Cl. 452 (1939).

Indians Claims Commission Act, 25 U.S.C. § 70k, *et seq. Western Cherokee Indians* v. *United States,* 1 Ind. Cl. Comm. 1 (1948), *rev'd,* 114 Ct. Cl. 716 (1949), 2 Ind. Cl. Comm. 7 (1952), *aff'd,* 124 Ct. Cl. 127 (1953); *Western Cherokee Indians* v. *United States,* 1 Ind. Cl. Comm. 20 (1938), *aff'd,* 116 Ct. Cl. 665 (1950), *cert. denied,* 340 U.S. 903 (1950); *Western Cherokee Indians* v. *United States,* 1 Ind. Cl. Comm. 165 (1949); *Cherokee Nation* v. *United States,* 2 Ind. Cl. Comm. 37 (1952); *Eastern or Emigrant Cherokee,* 1 Ind. Cl. Comm. 408; *Cherokee Nation,* 9 Ind. Cl. Comm., 435 (1961).

Mr. SYNAR. Thank you very much, Mr. Liotta. Let me ask you a few questions if I may.

Mr. LIOTTA. Yes, sir.

Mr. SYNAR. Your statement seems to reflect the view that this Congress is bound by previous Congresses and by the action of those Congresses when it passed the Indian Claims Commission Act. Surely you are not trying to indicate to this subcommittee today that we do not have the authority to take action such as what we are requesting in this bill?

Mr. LIOTTA. No, sir, the Congress can do anything at any time. The reason for my statement was to point out that when previous Congresses enacted the Indian Claims Commission Act, one of the purposes for the statute of limitations was to have these claims come forward within that time period and end the litigation.

As I recall, title 28, United States Code, section 2401 is another statute of limitation of 6 years. The purpose of my testimony is to point out that these statutes of limitations were put in by Congress and were enacted into law for a very serious purpose. That was to have these tribes bring their meritorious claims before the courts within a specific timeframe in order to get litigation over with. There has been, I am sure, litigation over the last 50 to 70 years, a Mr. Niebell says, and the statutes of limitation were enacted to bring an end to that situation.

Mr. SYNAR. Well, you are aware, of course, that Congress has on numerous occasions made exceptions and allowed cases to be filed despite the statute of limitations running out?

Mr. LIOTTA. I am aware of the fact that on occasion Congress has passed special legislation for various tribes which would, I think, in certain instances, waive the defense of *res judicata* and allow certain matters to be relitigated.

In many of these instances, I or someone on behalf of the administration appeared to oppose again this piecemeal approach.

Mr. SYNAR. But Congress has done it even with Justice Department opposition.

Mr. LIOTTA. Yes.

Mr. SYNAR. Let me ask you another question, if I may, Mr. Liotta. Is it Liotta?

Mr. LIOTTA. Either way.

Mr. SYNAR. What is it? How do you pronounce it?

Mr. LIOTTA. I pronounce it. Liotta. Some people say Liotta. So, you use your judgement.

Mr. SYNAR. When in your judgment did the statute begin to run on the riverbed case?

Mr. LIOTTA. Well, let me put it another way. And I would like to go back a little bit on that, if I may.

Mr. SYNAR. Sure.

Mr. LIOTTA. No. 1, as indicated by the prior witness, the tribe always thought that it owned the riverbed. I think that is the way I understood his testimony when he was speaking here. I am not sure you were here at that moment.

Mr. SYNAR. I am very familiar with the case.

Mr. LIOTTA. When the Indian Claims Commission Act was passed, if they felt they had this claim to the riverbed, even though they had lost it before, they had a right to file a claim under the fair and honorable dealings clause.

Furthermore, I would say this. Within the navigable waters of the United States no one to this date, to my knowledge, has recovered for acts done by the Federal Government.

The property within the bed of the navigable waters is subject to a limitation and subject to an easement, so to speak. It is subject to a paramount right of the United States to protect, to enhance commerce.

So the Indians in this case are on the same footing, in my opinion, as anyone else. No one else would collect.

Mr. SYNAR. If I may interrupt at this point?

Mr. LIOTTA. Yes, sir.

Mr. SYNAR. I think that is a very interesting conclusion, this navigational servitude. Are you aware of any precedent, for the defense of navagational servitude? And if so, could you please cite them for us?

Mr. LIOTTA. I am aware of precedents in matters for other than Indian tribes. I do not recall at the moment any involving Indian tribes. But I am aware and I can——

Mr. SYNAR. Are they of Indian tribes?

Mr. LIOTTA. Pardon me?

Mr. SYNAR. Are they or are they not precedences regarding Indian tribes?

Mr. LIOTTA. The cases that I am thinking about do not involve an Indian tribe claiming some right that was interferred with in a navigable stream where they received compensation.

Mr. SYNAR. That is our point exactly. That those cases of navigational servitude, which are precedent, do not involve Indian tribes. I would like to know if Justice has any——

Mr. LIOTTA. I think, Congressman, it is a general principle. And I think it will be sustained by the courts, although quite frankly. I am not sure. I do not know what the courts would do.

But everyone that has property in the navigable bed is subject to a paramount right of the United States to improve navigation. For example——

Mr. SYNAR. Let me ask you this question. Are you aware that in March 1979 a memorandum from the Interior Solicitor to the Sec-

retary, which I introduced today, notes for the record that no court has ever failed to award compensation to an Indian tribe for the Government's use of tribal riverbed lands.

Mr. LIOTTA. I think that I could also put it the other way. I do not think that they point out that any court has awarded compensation, Congressman, fully for the type of interests that are claimed here.

In other words, in this particular case as I understand it, when they were building this dam or improving a navigable stream, they allegedly took or destroyed $8 millon and some odd worth of gravel. I think that the Interior people have said that there is no compensable interest under the fifth amendment to the Constitution. However, there has been no case involving Indians that they know of. But they don't indicate, I don't believe, that this is an exception to the law. I think they more or less, as I understood it, advised the tribe that they do not believe the tribe has a compensable interest in the stream under the Constitution. And the tribe needed help, it had to go back to Congress and Congress had it within its power, if it so chose. Congress does have this power. Congress did this in amending the Rivers and Harbors Act granting certain rights. Congress has the power to waive and pay.

But I respectfully submit that, and I can not certify this because I do not know what a court will do, I think the Court would find that when navigable streams are improved the United States has a right to destroy property. The United States has a right to take property within that area and it does not come within the fifth amendment. They are not entitled to compensation. It is a paramount right of the United States.

Mr. SYNAR. That is our point exactly. That there is a lot of confusion. And what you guess the court will do and what we guess the court will do is really the issue at hand here. We are wanting the right to ask the court; not the outright payment of compensation. We are asking the right to clear up this confusion by giving the Cherokee Nation that ability to go to court to resolve this. We are not asking for compensation.

As you correctly pointed out, that will be a determination of the court. What we are asking here is to give the Cherokees a legitimate right to seek the elimination of this confusion.

Mr. LIOTTA. Well, regardless of how the title was determined back when, the fact of the matter is, Mr. Chairman, as I understood, and I am sure they were represented during the years by very able counsel, they always claimed that they owned the bed of this navigable stream. The Indian Claims Commission Act, which has nothing to do with titles specifically, says that we are going to compensate Indians for unfair and dishonorable dealings and they have the right to file a claim.

I suggest to you, sir, that in that timeframe they could have and they should have filed their claim. And I am suggesting to you, sir, that now in 1981 when we open this issue again and go back to court, what it is going to be, in substance, is the court reviewing and dealing with knowns and absolutes in the law concerning navigable servitude. And I would submit that unless there is something different for Indian tribes, which I doubt, it is going to be an exercise in futility.

Mr. SYNAR. Well, let me suggest to you, if I may. First of all, prior to the 1970 Supreme Court ruling, riverbed land was erroneously thought to belong to the State of Oklahoma. And until that time the Cherokees had no claim whatsoever.

Mr. LIOTTA. Against the Government. That is correct.

Mr. SYNAR. Let me add the second thing. You have been very articulate in your remarks. As you remember this morning, I submitted two documents. The first was a June 1978 letter from Secretary of Interior Cecil Andrus to Congressman Sid Yates. It outlines the negotiated settlement for the sand and gravel resources agreed to by the Interior Department.

The other was a March 1979 memo from the Interior Solicitor to Secretary Andrus which states that had the Supreme Court decision preceded the authorization of the navigational project, the Secretary's trust obligation to protect the property interest of the tribe would have compelled him to request special legislation.

You are familiar with the fact that since 1970, the Interior Department has entered into negotiations for compensation. So, obviously the Government does feel like it does have some obligation based upon these letters and memorandums.

Which flies right in the face of your argument that this would be an exercise in futility when the Government has already admitted through its own actions through the Department of Interior that they do indeed feel an obligation.

Mr. LIOTTA. Mr. Chairman?

Mr. SYNAR. Yes.

Mr. LIOTTA. I think it is two different situations that we are confronting here. One is, I think, that Interior is suggesting that, if it is within the wisdom of Congress to give the Cherokee Nation or anyone something that is not compensable under the law, that can be done. And I think that is what Interior was saying. Interior I think was saying, and I don't know because I did not consult with them, but I think what they were saying is, we feel that this tribe, the Cherokee Nation, has lost 8 million dollars' worth of gravel. And we feel they ought to be paid for it. Knowing what the law is, we suggest that you go back to Congress. We are not sure we can do it. And I think that is the way that thing was finally resolved. They were not sure and they did not think they could do it.

Go back to Congress and let them pass special legislation giving you, the Indian tribe, $8 million. If that is the case, we do not deal with the courts, and the Supreme Court's decisions and various decisions that deal with this subject.

And I think that is what they were suggesting. So, I think that you and I are talking about two different points. Your point is that the Department of the Interior felt at one time or another that this tribe should be compensated because it was not fair, in their opinion. And I think they were suggesting the tribe go to Congress, and let Congress pass a bill and pay them because we do not think you can get it through the courts.

What I am addressing myself to is the issue of the courts. I think the law, respectfully sir, is well settled. As I pointed out before, I do not recall any case, though there may be some, wherein the Indian tribes were involved and it was now determined as their property. But I don't believe, and that is just my opinion as a

lawyer, that the result is going to be any different. I could be wrong. But I think the principle——

Mr. SYNAR. That is exactly the point I am trying to make. You could be wrong and therefore, we should give the Cherokee Nation the ability to go into court and resolve that issue alone.

Let me ask you another question.

Mr. LIOTTA. Yes, sir.

Mr. SYNAR. In your testimony on page 2. You said it appears that the Cherokees were awarded a total of $16,152,000 in the cases involved. You are not in any shape, manner, or form trying to intimate here that they have been duly compensated for their riverbed by those past awardments?

Mr. LIOTTA. No, sir. Absolutely not.

Mr. SYNAR. OK. Just wanted to make that perfectly clear.

Mr. LIOTTA. No, sir. No, sir. And so far as I know there has been no compensation paid to the Cherokees or anyone else, whether Cherokees, Indians, or non-Indians, for property within the navigable waters of the United States under a navigable servitude situation of this type.

Mr. SYNAR. All right. Before you began to testify I entered into the record for the files of the letters sent to the Department of the Interior. And then on December 7 your letter saying that you would testify. Can you explain to me why the Department of the Interior is not here today to testify?

Mr. LIOTTA. No, sir, I cannot. I was requested to come here and testify on behalf of the administration.

Mr. SYNAR. By whom?

Mr. LIOTTA. Well, originally my superior Carol Dinkins was to be the one testifying. She was unavailable and I was advised by our legislation people that I was designated to testify. By whom specifically, I do not know.

Mr. SYNAR. I would be very interested to know if you could provide for this subcommittee what correspondence was exchanged between the Department of the Interior and the Department of Justice and the reasoning behind the Department of the Interior's refusal to be here today. I think this is imperative since the Department of the Interior has a very serious and very clear trust responsibility to the Indian tribes. And their absence here this morning is a blatant example of a failure to understand the comprehensive problems which face the American Indian tribes of the country. I have no further questions.

Mr. LIOTTA. I would certainly be glad to do that as best I can.

Mr. DANIELSON [presiding]. Unfortunately, I missed some testimony when I went to the floor. You did give us a prepared statement, I believe?

Mr. LIOTTA. Yes, Mr. Chairman.

Mr. DANIELSON. I did not have it in my kit last night and so I have not read it, but I promise you that I will. Can you tell me why action was not taken on this before? That probably should have been a question for Chief Swimmer, but you can give me your interpretation why action was not taken earlier?

Mr. LIOTTA. Well, I am not sure I can answer that, but in fairness to the Indian tribe, what I have heard is that originally this

land within the bed of the stream was determined and titled to be in the State of Oklahoma. There was a court decision that so held.

By reason of the equal footing doctrine when the State came into the Union, it was determined by the courts, as I understand, that this property was owned by the State of Oklahoma.

Then, as I understand it, in 1970, the Supreme Court held that the bed of the stream is owned by the Cherokee Indians, and I believe the Choctaw and the Chickasaw Indians.

Mr. DANIELSON. Has anything happened since that time to change that holding of the Supreme Court?

Mr. LIOTTA. No, sir, not that I know of.

Mr. DANIELSON. Is there any quarrel that the bed and banks of the river in that given area do belong to the tribe?

Mr. LIOTTA. I do not believe so, sir.

Mr. DANIELSON. And they have been deprived, have they not, of some of the property rights in that——

Mr. LIOTTA. I would respectfully submit, sir, that I would have to answer that question more fully because you are saying property rights.

Mr. DANIELSON. I am talking about the removal of sand and gravel.

Mr. LIOTTA. I understand there was——

Mr. DANIELSON. There was waste committed. What we would call waste if it were dry land I assume?

Mr. LIOTTA. Well, again Mr. Chairman, under the law, because of the circumstances you did miss my earlier statement.

Mr. DANIELSON. I am sorry but I did.

Mr. LIOTTA. I know, that is all right. But the fact of the matter is that it is not a question of waste or that type of thing. I know what you are getting at.

What I had suggested before was that the United States has a paramount right regardless of who owns title in a navigable water of the United States. It is a right that has been stated to be an easement, so to speak. That right of the United States is to improve navigation. And with that right they can destroy within the bed of the stream. They can remove obstructions. They can dig. They can take the material out and dump it somewhere else. It is a paramount right that everyone in this country is subjected to. And in my recollection that right is not one for which the United States has ever had to pay just compensation.

It is not a fifth amendment taking.

Mr. DANIELSON. Is there any other area, except this particular riverbed and area, in which someone other than either a State or the Federal Government has a fee simple title of a navigable stream?

Mr. LIOTTA. I am not sure that I know the answer to that. But I would say this, I think probably this is the only Indian nation, as the gentleman that preceded me stated, that owns the bed of a navigable water such as this. Most of the time, these beds of the streams are owned by the various States.

I might say this too——

Mr. DANIELSON. You have brought out the paramount right of the United States to utilize this easement. The right to use the bed

of a navigable stream for whatever purpose you just describe. To remove gravel, sand, dredge.

Mr. LIOTTA. For the purposes of navigation. I would submit, sir, that if the Federal Government came in, not for the purposes of navigation, but for the purposes of wanting the gravel in that stream, they would have to pay the Cherokee Nation for it. But for the purposes of improving navigation, the United States has a dominant right under the commerce clause of the Constitution. The dominant right to remove, to destroy.

For example, if someone fills land and puts a building on it and that interferes with navigation, the United States can go in and remove the building and pay no compensation.

Now, as I pointed out to Congressman Synar, I do not recall any case where an Indian tribe was an owner of the bed. It is a unique situation to that extent.

But I would suggest to you that, in my humble opinion, the navigable servitude would apply regardless of whether it is Indian or anyone else. That these paramount and dominant rights of the United States exist.

Mr. DANIELSON. Yes; I will yield, go ahead.

Mr. SYNAR. But that is the point we are trying to resolve here today. Your opinion and my opinion are two different things on how they should be resolved.

Is it your position that the Cherokee Nation does not have the legitimate right to resolve that one simple issue?

Mr. LIOTTA. No, sir, except in this sense. I would like to say that certainly I do not and no one else advocates any injustices. I do not mean it in that sense. What I am saying is that during the time of the Indian Claims Commission Act, there was a 5-year statute of limitations. And regardless of who allegedly owned that land, the Indians have brought many claims where people have said we own it but you do not. And they brought many of them during that period of time.

I am saying that they had their day, that during those 5 years they had time. Now, as a matter of fact, the Creeks and the Seminoles, as I understand it, brought an action concerning the station grounds within the statute of limitations. So, what I am saying is that there has to be an end to this period of litigation, that Congress in its wisdom had originally set statute of limitations, and that they had their time and they were represented by extremely able counsel.

I might say that on occasion I have had the pleasure of talking to Mr. Niebell. He is a very, very astute man. They have had extremely good counsel, and did not bring this claim during this timeframe.

Even after the 1970 decision of the Supreme Court determining the titles to the navigable waters, they proceeded regardless of the statute of limitations in title 25, United States Code, section 2401 which gives them 6 years. I do not say they could recover, I doubt it very strongly as I have indicated, but they did not even bring an action within that 6 years.

Mr. SYNAR. Let me ask you this. As you have pointed out and I think I have pointed out pretty adequately today, Congress is not bound by that. On numerous occasions since then when we found

some unique situations such as that which I think this case presents, we have been within our authority to allow a waiver of the statute of limitation. And, as you have adequately said, every time the Justice Department comes down and argues the other way. But the Congress is within its legitimate power to do what we are asking in this legislation today.

Mr. LIOTTA. You have done it before, sir.

Mr. SYNAR. Thank you.

Mr. DANIELSON. I want to get back to where I was, sir. You stated in response to one of my questions that you know of no other instance in which an Indian tribe owns the bed of a navigable stream except this one.

Mr. LIOTTA. I could be wrong.

Mr. DANIELSON. I know you could be wrong. But I just said do you know of no others?

Mr. LIOTTA. To my knowledge that is right.

Mr. DANIELSON. You could recall none at this time?

Mr. LIOTTA. No, sir.

Mr. DANIELSON. Can you recall at this time any situation in which any owner other than a Government entity owns the bed of a navigable stream within the United States?

Mr. LIOTTA. Not that I know of.

Mr. DANIELSON. So it is not limited to Indian tribes then? You know of no one then who owns the bed of a navigable stream within the United States?

Mr. LIOTTA. Well, I suppose——

Mr. DANIELSON. May we stipulate and get away from this point. Anything you do not know about is possible. I am asking what you know about.

Mr. LIOTTA. Personally I do not know of any.

Mr. DANIELSON. All right. All I am asking for is a responsive answer.

Mr. LIOTTA. Yes, Mr. Chairman.

Mr. DANIELSON. And if you do not know it, that is a good answer. I would ask then; are the precedent that allow the navigable servitude in those instances where people other than Indian tribes do not own the riverbed, are they actually a precedent for a situation in which someone does own the riverbed?

Mr. LIOTTA. I believe they are.

Mr. DANIELSON. Do you know if that has ever been adjudicated by any court anywhere?

Mr. LIOTTA. Yes, I think I can answer it this way. There are times when power companies have had facilities in navigable waters and have attempted to collect for their power and so forth.

Mr. DANIELSON. But did they own the riverbed?

Mr. LIOTTA. No, not that I know of.

Mr. DANIELSON. But here we have the Indian tribe owning the riverbed. That is what I am asking. I do not think that we have the same situation where no one owns the riverbed that we have when someone does own the riverbed. Those are two different things.

Mr. LIOTTA. Except, Mr. Chairman, respectfully may I say this?

Mr. DANIELSON. Yes.

Mr. LIOTTA. That the ownership of the bed, in my opinion, does not really matter.

Mr. DANIELSON. Well, it would if I owned it, I can promise you.

Mr. LIOTTA. No, sir.

Mr. DANIELSON. If I owned it, it would matter.

Mr. LIOTTA. It would matter to you personally and in this case it matters personally to the Cherokees and the other tribes. But insofar as the theory of the dominant right of the United States in navigable waters, it does not matter. It does not matter who owns it.

Mr. DANIELSON. Has any court ever adjudicated that?

Mr. LIOTTA. Yes, sir, insofar as the dominant right of the United States in the navigable waters.

Mr. DANIELSON. When someone else owned in fee simple a riverbed of a navigable stream? Because you say you know of no such situation.

Mr. LIOTTA. I do not know whether the ownership——

Mr. DANIELSON. I think you are talking about donkeys and apples here.

Mr. LIOTTA. I do not think so, sir.

Mr. DANIELSON. Yes, in one case they own the riverbed. Another case they do not own the riverbed. A judicial decision where the riverbed is not owned by someone is different than one where it is owned by someone.

Mr. LIOTTA. Mr. Chairman, the fact that I do not recall it does not mean that it does not happen.

Mr. DANIELSON. Well, you know I always leave a margin for error. On a computer you never know.

Mr. LIOTTA. We lawyers all do that. But, Mr. Chairman, I still say that in a careful reading of the Supreme Court cases, the question of title is of no issue. It does not make any difference who owns it.

Mr. DANIELSON. Well, I will stipulate that I have not read them. But I asked if you knew of one.

Mr. LIOTTA. Offhand I do not. I have read so many of these things.

Mr. DANIELSON. Would you do this? If within the next week or 10 days you can find a judicial interpretation, hopefully of the Supreme Court but at least from the district court or the highest authority you can find, in which a claimant owned a riverbed of a navigable stream in the same manner that the Supreme Court has said that the Cherokee Nation owns this riverbed in which the navigable servitude has been exercised to no avail on the part of the landowner. If you could find one, we would sure appreciate it.

Mr. LIOTTA. I think I have one right here. I am not sure. I just recalled something. There was a case called *Coastal Petroleum Company* v. *United States* (524 F. 2d 1206 (CT. Cl. 1975)).

Mr. DANIELSON. It is not too old.

Mr. LIOTTA. It was a 1975 case before the Court of Claims. I think that there was a private ownership of limestone within the bed, so they must have owned the bed. I am just trying to recall the case.

As I recollect, the Court of Claims held that even if the United States received commercial value for the limestone it removed under the rights of the navigable servitude, they have a right to remove the limestone. They have a right to destroy it and they do not have to pay anybody a dime.

I think that would be the authority.

Mr. DANIELSON. And you believe that this is a case in which this claimant claimed to own the bed of a navigable stream?

Mr. LIOTTA. I believe that, sir.

Mr. DANIELSON. Well, that would certainly be in point and responsive to my question. We will want to check that out a bit and I hope that you will be kind enough to put some of your legal talent to work.

Mr. LIOTTA. I will take a look at that one.

Mr. DANIELSON. I think it is an important point here.

[The following was received for the record:]

COASTAL PETROLEUM COMPANY

v.

The UNITED STATES.

No. 309–72.

United States Court of Claims.

Oct. 22, 1975.

As Amended Jan. 23, 1976.

Plaintiff claimed compensation for the federal government's taking and use of limestone removed from the bottom of a navigable lake. On motion by the United States for summary judgment, the Court of Claims, Davis, J., held that even if the work in question was for flood control, the federal government's taking was within the navigation servitude. The project was to be considered as authorized as a whole, for construction as found proper by the Corps of Engineers, and so long as the limestone taken was employed for the levee project, which was itself governed by navigation servitude, use of submerged minerals below high-water mark of same navigable water was authorized as part of and directly incident to main work, and compensation was not required, even if limestone was quarried from middle of lake, outside immediate construction area, and even if the United States received some commercial, rather than military, benefits from use of the limestone.

Motion for summary judgment granted, and count of petition dismissed; case remanded for purpose of proceedings on second count.

1. **Navigable Waters** ⇐36(3)

Navigation servitude reserves to federal government a dominant interest in all submerged property within navigable waters below mean or ordinary high-water mark.

2. **Navigable Waters** ⇐16

Navigation servitude is extremely old concept, and owners of property or property rights within navigable waters take those rights wholly cognizant of their limited nature.

3. **Navigable Waters** ⇐16

Navigation easement is not limited to thread of stream where vessels pass but extends from ordinary high water on one side to ordinary high water on the other; where applicable, servitude covers whole of water found to be navigable, not merely channel actually used.

4. **Navigable Waters** ⇐16

Even if work in question was for flood control, federal government's taking of limestone from bottom of navigable lake was within navigation servitude. Act June 30, 1948, § 203, 62 Stat. 1175.

5. **Navigable Waters** ⇐16

Congress may decide in particular case not to rely on navigation servitude but rather to compensate owners of submerged land in navigable waters for actions which, like those to which servitude is applicable, are grounded in power of federal government to regulate commerce, but where project has legitimate navigation purpose and there is no ascertainable congressional intent to pay compensation, presumption is that Congress intended to exercise both navigation power and navigation servitude. 33 U.S.C.A. § 701c; Act June 30, 1948, § 201, 62 Stat. 1175.

6. **Levees and Flood Control** ⇐15

Corps of Engineers could, without compensation, preempt use of bottom of navigable lake to support levee rather than to allow it to be used for mining limestone. Act June 30, 1948, § 203, 62 Stat. 1175.

7. **Eminent Domain** ⇐2(10)
Navigable Waters ⇐36(3)

Project involving dredging of navigable lake was to be considered as authorized as a whole, for construction as found proper by Corps of Engineers, and so long as limestone taken from bottom of lake was employed for levee project, which was itself governed by navigation servitude, use of submerged minerals below high-water mark of same navigable water was authorized as part of and directly incident to main work, and compensation was not required, even if lime-

stone was quarried from middle of lake, outside immediate construction area, and even if United States received some commercial rather than military, benefits from use of the limestone. Act June 30, 1948, § 203, 62 Stat. 1175; U.S.C.A. Const. Amend. 5.

Irving R. M. Panzer, Washington, D. C., atty. of record, and E. Michael Paturis, Washington, D. C., for plaintiff. C. Dean Reasoner and Reasoner, Davis & Vinson, Washington, D. C., of counsel.

Irwin L. Schroeder, Jr., Washington, D. C., with whom was Asst. Atty. Gen. Wallace H. Johnson, for defendant.

Before COWEN, Chief Judge, and DAVIS and NICHOLS, Judges.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DAVIS, Judge.

This is a tussle over some limestone at the bottom of Lake Okeechobee in Florida. Plaintiff Coastal Petroleum Company, claiming a compensable interest in the limestone through a lease from an organ of the State of Florida, says that the United States took the mineral without paying for it. The defendant, for its part, asserts, first, that plaintiff has no such compensable interest, and, second, that in any event the Federal Government had the right to use the limestone under its navigation servitude which it exercised in the Lake Okeechobee project. Defendant has moved for summary judgment on this portion of the petition.[1]

For the purposes of this motion, plaintiff is conceded to be the lessee of a valid mineral-drilling lease, granted by the Trustees of the Internal Improvement Fund of the State of Florida, originally let in 1944, modified in 1947 and renewable for five-year terms.[2] This document, Drilling Lease No. 248, grants plaintiff "[a]ll those water bottoms lying within the boundaries of Lake Okeechobee * * * for the purpose of drilling for and producing therefrom oil, gas, sulphur, casinghead gas and casinghead gasoline * * *." Florida has held this lease to cover all minerals.[3]

In 1965, the United States acquired from the Central and Southern Florida Food Control District two easements covering at least part of the same land covered by the Coastal lease, for the purpose of "construction, maintenance and operation" of the levees on Lake Okeechobee authorized by the Act of June 30, 1948, ch. 771, § 203, 62 Stat. 1176.[4] The easements granted the United States by the Flood Control District had previously

1. Count II of the petition asserts a separate claim under another lease for the taking of limestone in another part of Florida, in the course of the building of the Trans-Florida Canal. That count is not now before us.

2. There is now pending in the Fifth Circuit a case challenging on state grounds the existence and validity (after 1964) of plaintiff's leases from the Internal Improvement Fund. The Fifth Circuit has referred the issue to the Supreme Court of Florida. *See infra.* The United States reserves the right to attack the lease on that state ground if its present motion is denied.

3. In a 1960 decision as to which certiorari was discharged by the Florida Supreme Court, 125 So.2d 300, the District Court of Appeals of Florida for the First District determined that the lease included drilling rights for all minerals defined in the broadest sense. *Collins v. Coastal Petroleum Co.*, 118 So.2d 796, 803 (Fla.Dist.Ct.App.1960). As a decision on the point by an intermediate state court, which the highest court refused to review, this ruling is binding on us, *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467, 61 S.Ct. 8, 85 L.Ed. 284 (1940), and we assume that Coastal's drilling rights included the right to mine limestone.

4. The authorizing statute is short and does not contain a description of the project. However, it incorporates by reference the *Comprehensive Report on Central and Southern Florida for Flood Control and Other Purposes, H. R. Doc. No. 643*, 80th Cong., 2d Sess. (1948), which described the program in some detail, and includes plans for "a low levee * * * around the lake shore from the St. Lucie Canal northward to tie in with the present north shore levee." *Ibid.* at 40. The construction of that levee precipitated this suit.

been conveyed to the District by Coastal's lessor, the Florida Internal Improvement Fund, in order to pass them on to the United States. The easements specifically allowed the United States to "dig, excavate or otherwise construct artificial channels or waterways" and to "erect or construct levees and/or dikes."[5]

In the middle or late 1960's, the Corps of Engineers commenced construction of the levee on Lake Okeechobee. It was built "by digging a borrow pit and placing the excavated material on the lake side of the borrow pit." Affidavit of C. W. Pritchett, dated April 14, 1975. In 1968 Coastal filed a suit in the U. S. District Court for the Southern District of Florida in which the company attempted to obtain a mandatory injunction requiring the Corps to issue Coastal a permit to mine limestone in the lake. The permit had been denied because state and local authorities, who were joined as defendants, refused to support the application, largely for environmental reasons. Coastal asked in the alternative for a decree on behalf of either the federal or state defendants condemning its property in either the lease or the minerals and granting compensation. In addition, Coastal asked compensation, against any defendant, for a taking of limestone mined by the Corps and used for the levee. The District Court refused on public policy grounds to grant the injunction, but found that the refusal to grant a permit had worked a taking by the state agencies and that Coastal was entitled to lost profits. *Coastal Petroleum Co. v. Secretary of the Army*, 315 F.Supp. 845, 850 (S.D.Fla.1970). The court did not decide whether there had also been a taking by the federal defendants, because the issue was at that time before the Fifth Circuit in another case. In July, 1970, the Fifth Circuit decided in *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971), that a refusal by the Corps of Engineers to grant a permit (there, to fill a bay) because the project would have adverse environmental, rather than navigation, effects, was a proper exercise of federal power under the Commerce Clause and, additionally, because of the navigation servitude, did not work a taking of any property rights of the owners of the bed of the bay and land riparian to it. *Ibid.* at 214, 215.

Reacting to *Zabel*, the District Court on October 6, 1970, reversed its earlier decision on the taking issue, and declared that "the federal defendants had the right to deny plaintiff's application to mine in the 5.7 acres applied for, and therefore there was no taking of plaintiff's property in the 5.7 acres." Order, Nos. 68–951–Civ–CA and 69–699–Civ–CA (S.D.Fla. Oct. 6, 1970). The court asked for further briefs on whether the federal defendants should be dismissed or the case transferred to the Court of Claims, evidently on the view that the District Court did not have jurisdiction to declare an inverse condemnation of plaintiff's property if the amount exceeded $10,000. *See* 28 U.S.C. § 1346 (a)(2). In a memorandum decision and order dated February 5, 1971, the District Court dismissed the suit as against the federal defendants, and found that, as a matter of state law, Coastal had acquired by its lease no compensable property right to the minerals in Lake Okeechobee prior to the time they were mined, and that therefore the state defendants were not liable to

5. The easement provided that the Government did not acquire any right or interest "in and to any such spoil and spoil materials as may be excavated, dredged or otherwise removed from the hereinafter described lands, except for such excavated materials required for the Project Works hereinabove referred to * * *." The reason for this provision is unclear (it may have been designed to keep the United States from having to dispose of the spoil material), and the parties have not provided us with any information on the intent of either the Government or the Flood Control District. Both parties seem to agree, though, that the limestone is not "spoil" or "spoil material." In that event, the easement says nothing about title to it, although the existence of the proviso suggests that the United States was granted some rights to use materials found in the easement area.

Coastal for any taking by virtue of their having granted the United States the easement to build the levee. Coastal did not appeal either the decision dismissing as against the federal defendants or the determination that its ownership rights under the leases were limited to minerals already mined. The state defendants appealed the court's separate holding that Coastal's lease was currently valid under Florida law.

Following the District Court decision, however, Coastal filed suit in this court alleging that in building and maintaining the levee, the United States (1) prevented Coastal from mining limestone under and near the levee and (2) mined and used limestone from the bed of Lake Okeechobee, which limestone belonged to Coastal, all of which amounted to a Fifth Amendment taking of plaintiff's property—both the right to mine and the minerals themselves. Because the Fifth Circuit, as a result of the appeal by the state defendants in the District Court case, has before it the issue of the validity of Coastal's leases from 1964 to the present (including the period during which the levee was built), proceedings in this case were stayed awaiting decision on that issue. The Fifth Circuit has certified the question to the Florida Supreme Court, which appears unlikely to respond in the near future.

Defendant now contends, in its motion for summary judgment, that the case can be disposed of in its favor, without considering the validity of the lease under state law, on either of two grounds—that Coastal is collaterally estopped from asserting its ownership of unmined minerals by the unappealed decision in the District Court case or that any "taking" is non-compensable by reason of the navigation servitude. Coastal replies that, since the federal defendants were dismissed from the District Court suit for lack of jurisdiction, the doctrine of mutuality prevents the Government from now relying on the decision with respect to the scope of the lease in favor of the state defendants in that case. Coastal also says that the Lake Okeechobee project was a flood control project, rather than an action in aid of navigation, that Congress recognized this, and that therefore the navigation servitude does not apply.

We need not now consider whether plaintiff is collaterally estopped by the District Court's ruling that under Florida law the lease gives it no compensable interest in the limestone in place because we are satisfied that, in any event, the United States can use that limestone, as it has, as part of the exercise of its navigation servitude.

[1–3] The latter privilege reserves to the Federal Government a dominant interest in all submerged property within navigable waters, below mean or ordinary high water mark. *United States v. Chicago, M., St. P. & P. R.R.*, 312 U.S. 592, 596–97, 61 S.Ct. 772, 85 L.Ed. 1064 (1941). This navigation servitude is an extremely old concept—owners of property or property rights within navigable waters take those rights fully cognizant of their limited nature. *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808, 70 S.Ct. 885, 94 L.Ed. 1277 (1950); *Gibson v. United States*, 166 U.S. 269, 17 S.Ct. 578, 41 L.Ed. 996 (1897). Plaintiff has admitted in answer to defendant's interrogatories that all the minerals about which it complains (in this part of its petition) were located below ordinary high water. Answers of Coastal Petroleum Co. to Interrogatories of Defendant ¶ 10. Coastal attempts, however, to take the case outside the navigation servitude by pointing out, as one of its points, that the limestone may not all have been taken "from the navigable waterway of the United States that runs through Lake Okeechobee." *Ibid.* The short answer to this contention is that "[t]he navigation easement is not limited to the thread of the stream where vessels pass, but extends from ordinary high water on one side to ordinary high water on the other." *Allen Gun Club v. United States*, 180 Ct.Cl. 423, 429 (1967). Where applicable, the servitude covers the whole of the water

found to be navigable, not merely the channel actually used.

[4] The main argument for plaintiff is that the right of the United States to take or use such submerged property is limited to actions in aid of navigation, but that the work here was for flood control, rather than to aid navigation. The categories are not so distinct. In *Allen Gun Club v. United States, supra*, we held that flood control projects on the Mississippi and its source streams were also, because of the disastrous effects flooding has on navigation, projects in aid of navigation and that the navigation servitude therefore applied. 180 Ct.Cl. at 429–30; *see United States v. Twin City Power Co.*, 350 U.S. 222, 223–24, 76 S.Ct. 259, 100 L.Ed. 240 (1956); *United States v. Grand River Dam Authority*, 363 U.S. 229, 231–33, 80 S.Ct. 1134, 4 L.Ed.2d 1186 (1960); *United States v. Commodore Park, Inc.*, 324 U.S. 386, 391–93, 65 S.Ct. 803, 89 L.Ed. 1017 (1945); *cf. Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525–26, 61 S.Ct. 1050, 85 L.Ed. 1487 (1941). The statute under which many flood control undertakings, including the Central and Southern Florida Flood Control Project, are authorized states that the projects are "for the benefit of navigation and the control of destructive floodwaters and other purposes." Act of June 30, 1948, ch. 771, § 203, 62 Stat. 1175. Such a declaration has consistently been held conclusive to determine the navigation purpose of a project. *United States v. Grand River Dam Authority, supra*, 363 U.S. at 232, 80 S.Ct. 1134 and cases cited therein; *United States v. Twin City Power Co., supra*, at 224, 76 S.Ct. 259, and cases cited. Furthermore, the particular action which forms the basis of this suit, the construction of the Lake Okeechobee levee, was included in the project in large part because of the benefits it would provide for navigation on the Intracoastal Waterway, and this was one of the few parts of the project over which the Federal Government retained control after construction. H.R. Doc. No. 643, 80th Cong., 2d Sess. 8, 36–37, 41, 49, 53 (1949). We hold, therefore, that the project involved here is entitled to the benefits of the navigation servitude.

[5, 6] Congress may, of course, decide in a particular case not to rely on the servitude, but rather to compensate owners of submerged land in navigable waters for actions which, like those to which the servitude is applicable, are grounded in the power of the Federal Government to regulate commerce. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739, 70 S.Ct. 955, 94 L.Ed. 1231, (1950); *F.P.C. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 254–56, 74 S.Ct. 487, 98 L.Ed. 686 (1954). But where a project has a legitimate navigation purpose, and there is no ascertainable Congressional intent to pay compensation, the presumption is that Congress intended to exercise both its navigation power and the navigation servitude. *United States v. Twin City Power Co., supra*, 350 U.S. at 225, 80 S.Ct. 1134; *United States v. Kansas City Life Ins. Co., supra*, 339 U.S. at 808, 70 S.Ct. 885 (decided the same day as *Gerlach*); *United States v. Rands*, 389 U.S. 121, 122–24, 88 S.Ct. 625, 19 L.Ed.2d 329 (1967). That presumption is strengthened here by the proviso in the statute authorizing the project that "nothing herein shall impair or abridge the powers now existing in the Department of War with respect to navigable streams • • •" Act of June 22, 1936, ch. 688, § 3, 49 Stat. 1571; *see* Act of June 30, 1948, ch. 771, § 201, 62 Stat. 1175. We find nothing to persuade that Congress, despite its traditional right to use the submerged property without compensation, desired to make payment to the owners.

To say the navigation servitude applies to the Lake Okeechobee project needs, however, to be further refined. Coastal makes two distinguishable claims—one relating to its inability to mine under and near the levee and the other concerning the use of limestone mined by

the United States in building the levee. Once we have determined that the navigation servitude applies to this project, it is obvious that Coastal need not be compensated for loss of its right to take the stone under and near the levee. Such mining would in all probability have destroyed the levee either directly or by weakening the subsurface structure. Since any right to mine was subservient to the use of the property by the Federal Government in aid of navigation, the Corps of Engineers could, without compensation, preempt use of the lake bottom to support the levee rather than allow it to be used for mining.

While the application of the navigation servitude to limestone mined by the Government elsewhere than in the borrow pit for use in the levee is less clear,[6] we believe that the principle of *United States v. Commodore Park Inc.*, 324 U.S. 386, 65 S.Ct. 803, 89 L.Ed. 1017 (1945), requires a decision for defendant. In that case, the United States, to provide better landing facilities for sea planes based at the Hampton Roads Naval Operating Base, dredged Willoughby Bay, a navigable waterway, to a depth of 10 to 15 feet below mean low water. The dredged material was used to enlarge the shore facilities of the Base by placement at the mouth of Mason Creek, thereby destroying the navigability of that water. *Ibid.* at 389, 65 S.Ct. 803. Commodore Park owned fastlands on Mason Creek, and sued for a taking of that part of the value of its land which was based on its fronting on a navigable waterway. *Ibid.* at 387–88, 65 S.Ct. 803. The District Court found that neither the dredging nor the filling of Mason Creek had any relation to navigation, and granted compensation. The Fourth Circuit Court of Appeals affirmed, holding that while the dredging was related to navigation, the fill, which had caused the damage, was not. *Ibid.* at 388, 391, 65 S.Ct. 803. The Supreme Court reversed on two main grounds.

First, the Court found that there was no property interest owned by Commodore Park in the flow of Mason Creek, a finding which is irrelevant to this case as we now decide it. The Court then went on to find that the filling of Mason Creek was covered by the navigation servitude even though it impeded, rather than aided, navigation, and even though the project was on a distinct, though connected, body of water from the Bay where dredging in aid of navigation occurred. *Ibid.* at 392–93, 65 S.Ct. 803. It was the total project, not individual pieces of it which Congress, through the War Department, had determined to be in aid of navigation—and that judgment, invoking the navigation servitude, was not to be disturbed. *Ibid.* at 392, 65 S.Ct. 803.

[7] We think the same reasoning is applicable here. The Lake Okeechobee project must be considered as authorized as a whole, for construction as found proper by the Corps of Engineers. When the Corps decided (if it did, *see* note 6 *supra*) to use limestone found be-

6. Defendant's position is murky as to whether limestone from outside the borrow pit was used in constructing the levee. In its answer to Coastal's petition, defendant appeared to admit that substantial quantities of limestone from the lake bed were used in the construction. Answer ¶ 9; *see* Answer to First Amended Petition ¶ 9. On the other hand, in its latest submission, the affidavit of Construction Branch Chief C. W. Pritchett, defendant seems to imply that the only limestone taken from the lake bed was taken when the borrow pit, because of the irregularity of the lake shore, entered the lake. Affidavit of C. W. Pritchett ¶¶ 4, 5; Note 1 to Map entitled Levee 47–Section 1, Plan and Sections, submitted with affidavit. If this later explanation is correct, the servitude would clearly bar recovery since the borrow pit was an integral part of the levee and water control system. However, given the requirement that we view the facts most favorably to plaintiff on defendant's motion for summary judgment, *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962), and the uncertainty of defendant's response, we have considered the case on the assumption that limestone was quarried from the middle of the lake, outside of the immediate construction area.

low ordinary high water within the navigable waters in order to build the levee, there was "not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained resulted not from a taking of the * * owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject." *United States v. Chicago, M., St. P. & P. R.R., supra*, 312 U.S. at 597, 61 S.Ct. 772. So long as the limestone was employed for the levee project—which was itself plainly covered by the navigation servitude—that use of submerged minerals below the high water mark of the very same navigable water was authorized as part of and directly incident to the main work. No payment had to be made. "[T]he Congress, and those to whom it has delegated authority, may, without Fifth Amendment liability, employ land submerged under navigable water in the way that in their best judgment helps to accomplish the overall purpose even if, intentionally or not, they impair navigation for some purposes in some areas." *Allen Gun Club v. United States, supra*, 180 Ct.Cl. at 430. That the United States might have received some commercial, rather than military (as in *Commodore Park, supra*), benefit from use of the limestone does not reduce the extent of the dominant interest. *See United States v. Rands, supra; United States v. Twin City Power Co., supra.*

The defendant's motion for summary judgment is granted[7] and Count I of the petition is dismissed. The case is remanded to the trial division for appropriate proceedings on Count II.

7. Plaintiff has challenged the appropriateness of summary judgment, contending that there should be a trial to ascertain the purposes and scope of the Lake Okeechobee project, as well as of the circumstances surrounding the Government's use of the limestone. We think, however, that there is ample basis for our determination in the affidavit and documents supplied by the parties and in the legal materials relating to the project of which we can properly take judicial notice. Plaintiff does not present enough to raise any factual issue which should be tried.

Mr. SYNAR. May I ask one question on that case?

Mr. DANIELSON. Surely.

Mr. SYNAR. Was there a fiduciary relationship between Coastal Petroleum and the Government?

Mr. LIOTTA. No, sir, I do not think so.

Mr. SYNAR. Obviously demonstrating the uniqueness of this case—where a fiduciary relationship does exist between the Cherokee Nation and the Government.

Mr. LIOTTA. Pursuant to treaty, Executive order, or that type of thing. I am sure that was not involved in that case whatsoever.

Mr. SYNAR. Well, that sets that case apart rather quickly.

Mr. LIOTTA. Not necessarily. That is just another difference. And as a lawyer, I could argue back and forth with you on differences.

Mr. SYNAR. And that is why we need to go to court.

Mr. LIOTTA. I would respectfully differ with you, Congressman.

Mr. DANIELSON. Now, I have another question.

Mr. LIOTTA. Yes, sir.

Mr. DANIELSON. Apparently there was this decision of some years ago, in the 1920's, I think you said, where a court ruled that the bed of the stream did not belong to the Cherokee Nation.

Mr. LIOTTA. I did not address myself to that. The other gentleman did.

Mr. DANIELSON. Someone did.

Mr. LIOTTA. The answer is "yes."

Mr. DANIELSON. All right. OK. I will give you all credit for it. Someone brought up the point.

Mr. LIOTTA. Yes, sir, you are right.

Mr. DANIELSON. Then, as I understand it, it was 1970 before the U.S. Supreme Court said you are wrong, it belongs to the Cherokee Nation.

Mr. LIOTTA. That is right, sir.

Mr. DANIELSON. I would assume that even a prudent lawyer, up until 1970, would have assumed that the other decision would stand. A prudent lawyer would not be charged with the responsibility of asserting a property right which he has been told does not exist.

So, 1970 would have been the first time the Cherokee Nation would have been put on official notice that they had a property right here to look after. That is correct, is it not?

Mr. LIOTTA. That was the first time that their property rights were sustained.

Mr. DANIELSON. Well, that is what I am saying. More artfully worded than I said it, but we are saying the same thing.

OK, 1970, we have a period of limitations here of what—5 years?

Mr. LIOTTA. Under the 1946 Indian Claims Commission Act, it was 5 years. And then under section 2401 of title 28. Whether that is applicable in this instance I do not know.

Mr. DANIELSON. Well, let's be generous and call it 6 years.

Mr. LIOTTA. Yes, sir.

Mr. DANIELSON. That would be 1976. Can you tell me why they did not bring an action on or before the expiration of limitations in 1976?

Mr. LIOTTA. No, sir, I cannot.

Mr. DANIELSON. I have been on this committee for 11 years. I like to think of it as sort of the court of last resort because, believe me, after us there is no one left but St. Peter. That is true.

We very rarely waive the statute of limitations, Mr. Synar, to the contrary notwithstanding. We do it but it is rare. I would need to have compelling reasons. But I would like to know why action was not brought before 1976.

Now, will you comment on this? Attached to Chief Swimmer's statement is——

Mr. SYNAR. Mr. Chairman?

Mr. DANIELSON. Let me conclude this question here Mike and I will get back to you. Apparently there were negotiations going on between the Nation and the Department of the Interior. I presume that means the Bureau of Indian Affairs.

Mr. LIOTTA. I would assume so, sir.

Mr. DANIELSON. As recently as 1978.

Mr. LIOTTA. That is what I just heard and what I understood.

Mr. DANIELSON. Which is 2 years past the period of limitations and I suppose the lawyer should have filed before time except that apparently there was good faith bargaining going on back and forth between the Government and the Cherokee Nation up to at least 1978.

I understand that a proposed agreement, exhibit D, to Chief Swimmer's statement, was prepared by attorneys for the Department of the Interior. It was submitted to Chief Swimmer who, I understand, again did execute it on behalf of the Cherokee Nation. And returned it to Interior in the company of representations that they would be signing it and getting it back to the Cherokees soon. But it was never fully executed. Admittedly, it is not executed.

I am trying to think of what the lulling effect of that is. We pay attention to lulling here. You know, the Government, in my opinion, is more than just another party. It is the people of the United States. It is entitled to receive and does receive extreme credibility. And if there are good faith negotiations going on between an arm of the Government and a citizen, we tend to feel that the citizen should have the right to rely on those negotiations as not imperiling his position. Would you just comment on that point? It is one of the equitable things that we think of in this committee.

Mr. LIOTTA. I think that you are right on that score. I think we have duty over and beyond the ordinary.

Mr. DANIELSON. Yes; it goes beyond normal limits.

Mr. LIOTTA. I think we do. I have always tried to conduct myself accordingly and I think most people with the Federal Government do that. I think that if they came to me, which they did not, I would not have lulled them at all. Because I think what eventually happened there, and I do not recall this, Mr. Chairman, with all due respect to the papers you——

Mr. DANIELSON. I understand you cannot recall all of these things.

Mr. LIOTTA. But in any event, I think what must have happened there was that somewhere along the line someone realized that they had no authority to pay the $8 million. And I think what they probably said is look we have been talking to you about this, and this is all surmise on my part, but we can not pay you. So, if you

need help, you had better go to Congress and let them pass a special bill and pay you that money.

Mr. DANIELSON. That apparently did happen along in 1978 or thereabouts. But, of course in 1978 the statute of limitations had been gone for 2 years already even if we take the 6-year statute.

Mr. LIOTTA. Yes, that is true, if that 6-year statute applied.

Mr. SYNAR. Mr. Chairman, I might add a point regarding those negotiation periods which I think it will be borne out by what was submitted this morning. In 1978 when indeed, as you summarized, they told the Cherokees we do not have that authority, you are going to have to go to Congress. There were hearings held and the Interior Department came back then and flip-flopped and said we do not need that authority from Congress.

Mr. DANIELSON. Well, where were those hearings held Mr. Synar?

Mr. SYNAR. In the Senate.

Mr. DANIELSON. But is there a committee record somewhere? We got a nod. We will get that into the file too.

[The following was received for the record:]

ARKANSAS RIVERBED RIGHTS OF CHEROKEE, CHOCTAW, AND CHICKASAW INDIAN NATIONS; HEARING BEFORE THE U.S. SENATE, SELECT COMMITTEE ON INDIAN AFFAIRS

STATEMENT OF HON. DEWEY F. BARTLETT, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator BARTLETT. First of all, I want to thank the chairman for scheduling S. 660 for a hearing and the committee staff for the fine job it has done in preparing the legislation for consideration by this committee today.

The purpose of this measure is to authorize the Secretary of the Interior to enter into an agreement or agreements with the Cherokee, Choctaw, and Chickasaw Nations or tribes of Oklahoma for the purchase and/or lease by the United States, of their interest and right in the bed of the Arkansas River.

I will not take the committee's time to go into the history of this case because it has been a long, tortured legislative and judicial process involving many, many years of tribal time and efforts.

In April 1970, a little over 7 years ago, the Supreme Court affirmed fee title and right to possession in the bed and banks of a certain portion of the Arkansas River in the Cherokee, Choctaw, and Chickasaw Nations of Oklahoma. Since that time, the Congress has appropriated and the Department of the Interior has expended in excess of $1 million to conduct a survey and appraisal of the mineral reserves and valuations in that portion of the river in which the Supreme Court conferred ownership in the three nations.

The appraisals were completed in early 1976 and have been accepted by the tribes involved. In March 1976, the three tribes involved requested the Department of the Interior, their trustee, to negotiate a settlement of their interests in the riverbed based on the Government's appraisals. They were told that legislative authority was needed to enable the Department to enter into such negotiations with the tribes.

Pursuant to this response from the Interior Department, I requested from them and was furnished draft legislation that would give the Secretary the needed authority which Senator Bellmon and I introduced as S. 660. I am, therefore, deeply disturbed to learn this morning that the Department of the Interior is opposed to this legislation, and I wait with great anticipation for their explanation of the reasons for taking this position.

Mr. Chairman, I cannot stress too strongly the importance to the tribes, and the State of Oklahoma as well, that a settlement on the interests involved be reached as soon as possible. The benefits that will be derived from a settlement in this matter could quite conceivably determine the future of the entire eastern half of Oklahoma where the majority of Cherokee Indians reside, and contribute greatly to the economic self-sufficiency of the other two tribes. In the long run, a settlement such as is envisioned in this case, if managed properly, can save the Federal Government millions of dollars in Federal aid.

I support the purposes of S. 660 and urge the committee to act expeditiously on the measure so the tribes and Interior can get on with the task of negotiating a settlement in this matter.

Chairman ABOUREZK. Thank you, Senator Bartlett.

Our next witness is Mr. Raymond Butler, Acting Deputy Commissioner of Indian Affairs, Department of the Interior. He is speaking for the Department.

If you will introduce the people with you.

STATEMENT OF RAYMOND BUTLER, ACTING DEPUTY COMMISSIONER OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY CHARLES E. O'CONNELL, JR., ATTORNEY, OFFICE OF SOLICITOR, DEPARMENT OF THE INTERIOR; AND RALPH REESER, DIRECTOR OF CONGRESSIONAL AND LEGISLATIVE AFFAIRS, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. BUTLER. Thank you, Mr. Chairman and Senator Bartlett.

To my left is Mr. Charles O'Connell, from our solicitor's office. To my right is Mr. Ralph Reeser, our legislative counsel for the Bureau of Indian Affairs.

If I may I would like to summarize the prepared statement and I would like to have it introduced into the record.

Chairman ABOUREZK. So ordered.

[The prepared statement of Mr. Raymond Butler follows:]

"STATEMENT OF RAYMOND BUTLER, ACTING DEPUTY COMMISSIONER OF INDIAN AFFAIRS BEFORE THE MAY 25, 1977 HEARING OF THE U.S. SENATE SELECT COMMITTEE ON INDIAN AFFAIRS ON S. 660, A BILL TO AUTHORIZE THE SECRETARY OF THE INTERIOR TO ENTER INTO AN AGREEMENT WITH THE CHEROKEE, CHOCTAW, AND CHICKASAW INDIAN NATIONS FOR THE PURCHASE AND/OR LEASE BY THE UNITED STATES OF EACH NATION'S RIGHT AND INTERESTS IN THE RIVERBED OF THE ARKANSAS RIVER, AND FOR OTHER PURPOSES

"Mr. Chairman and members of the committee, I am pleased to appear before the committee today to testify on S. 660.

"S. 660 would authorize the Secretary of the Interior, after consultation with the Secretary of Defense, to enter into agreements with the three nations for the use, lease, and/or purchase of any rights of such nations in the bed of the Arkansas River. The Secretary of the Interior is to use as a basis for any agreement terms the value of the property rights of the nations in the Arkansas Riverbed, determined by appraisals conducted by the Secretary and accepted by the nations, and the payment terms shall not be less than such appraised value.

"Any agreements reached are to be submitted to the Congress and will become effective in 60 days of submission unless disapproved by a resolution of either House.

"In 1969, the United States Supreme Court considered the question of the ownership of the bed of the navigable portion of the Arkansas River in the State of Oklahoma and held that, with respect to the stretch of the river between the confluence of the Grand and Canadian Rivers, the Cherokee Nation alone holds fee title to the riverbed. The Court further held that, below the confluence with the Canadian River to the Oklahoma-Arkansas border, the Choctaw, Chickasaw, and Cherokee Nations hold title to the Arkansas Riverbed. In a subsequent 1975 case, a three judge district court found that the Cherokee Nation owns the north half of the natural bed of the Arkansas River from its confluence with the Canadian River to the Oklahoma-Arkansas border and the Choctaw and Chickasaw Nations jointly own the south half of the bed in the same stretch of the river.

"Prior to the Supreme Court's pronouncement, the Federal Government, including this Department was of the opinion that the State of Oklahoma held title to that portion of the Arkansas Riverbed between the confluence of the Grand River and the Oklahoma-Arkansas border. In fact, the Secretary of the Interior, by letter dated March 28, 1908, determined that title to that reach of the riverbed had vested in the State of Oklahoma upon its admission to the Union in 1907.

"In 1946 Congress, without consultation with the three Indian Nations, authorized the construction of the Corps of Engineers' McClellan-Kerr Arkansas River Navigation System. Part of this navigation system includes Locks and Dams, constructed on that reach of the Arkansas River to which the Supreme Court later found title to be vested in the three nations. The primary purpose of this dam system is to aid navigation in the Arkansas River with secondary benefits of hydroelectric power generation, recreation, and fish and wildlife protection.

"Upon the conclusion of the Supreme Court case, Congress, beginning in 1973, appropriated $440,000 annually for five years to fund a study to determine the extent

and value of each of the nation's mineral reserves in the Arkansas River from the Grand River to the Oklahoma-Arkansas border. Appraisal on the tribal lands was made for the value of the coal reserves, the market value of the land, market potential and land utilization, appraisal of power head rights, recreation, fish and wildlife benefits, appraisal of dam sites, oil and gas resources, and sand and gravel evaluation. This study places the total value of the nations' resources in this reach of the Arkansas Riverbed at $177 million.

"Mr. Chairman, we are not supporting enactment of S. 660 because it is not necessary. While, under the doctrine of navigational servitude, there is no precedent which obligates the Federal Government to pay damages, the Secretary can and will review the resources owned by the tribes without legislative direction. Upon completion of that review we will submit to the Congress our recommendations as to the appropriateness of any acquisition or compensation, or assistance to the tribes for leasing the minerals to third parties.

"Thank you, Mr. Chairman, that concludes my formal statement. I will be happy to answer any questions that you may have."

Mr. BUTLER. As has been stated by Senator Bellmon and Senator Barlett, I think the longstanding history is well documented.

The Bureau of Indian Affairs, following the Supreme Court decision relative to the tribes' title to this riverbed asked the Congress for funds under our authorization act or the Snyder Act in 1973 for an amount of $440,000 per year for a period of 5 years in which to conduct these inventories and studies.

It is my understanding that in the prior year of the negotiation stage there was some consideration in the former administration that specific authorization legislation of this type was necessary. However, we, in the Bureau of Indian Affairs and the Department of the Interior, at this time firmly believe that it is our trust responsibility in speaking to you, Mr. Chairman and members of the committee, as the trustee for this property right held by the tribes so we are not supporting this particular act of legislation at this time because it is our position that we already have the authority to enter into negotiations.

Chairman ABOUREZK. It that the only reason you are opposing this legislation?

Mr. BUTLER. That is correct.

Chairman ABOUREZK. There is no other reason you are opposing it?

Mr. BUTLER. We feel we have the specific authorization authority for acting as a fiduciary trust relationship to these tribes.

Chairman ABOUREZK. As you know the legislation was drafted at the request of the administration for the simple reason that the administration said it was needed before any further action could be taken on this claim.

Mr. BUTLER. In the discussions with the tribes, Mr. Chairman, yes.

Chairman ABOUREZK. You are aware of that?

Mr. BUTLER. Yes.

Chairman ABOUREZK. Is this another case of the administration backing away from something that it had committed itself to?

Mr. BUTLER. I believe, Mr. Chairman, that this was in the prior administration that there were bills introduced into the last session of Congress.

Senator BARTLETT. If the Chairman will yield, is it not also true that this Senator from Oklahoma was approached by the administration to introduce such legislation and that that legislation was introduced on request for the purpose of getting negotiations to take place; is that not correct?

Mr. BUTLER. That is correct, Senator Bartlett.

Senator BARTLETT. What change has taken place to reach the decision that you do not need the authority? And what change in the reasoning of the Department of the Interior as the trustee has taken place to make it change its opinion?

Mr. BUTLER. Senator, if I may I would defer that question to Mr. O'Connell of our solicitor's office for that answer.

Mr. O'CONNELL. Senator, we are considering the bill S. 660 which authorizes the implementation of an agreement, or effectuation of agreement, unless vetoed by either House of Congress.

Chairman ABOUREZK. Would you repeat that?

Mr. O'CONNELL. Section 2(a) of the S. 660 authorizes the effectuation and implementation of an agreement with the three Indian nations unless vetoed by one of the Houses of Congress. That has never been the position of the Department of Interior. I am talking about the one house veto.

If, however, the bill would read, for instance, that the proposed agreement would not become effectuated until approved by both Houses of Congress, then the bill does not authorize the Secretary of the Interior to do any more than the powers he already has.

Chairman ABOUREZK. We understand that.

Senator BARTLETT. Wouldn't that come under the term of nit-picking? [Laughter.]

It does not get down to the basic reason for wanting authority to negotiate and now not wanting that authority to negotiate; isn't that true? There was a specific bill introduced and that section was mentioned.

Mr. O'CONNELL. The section 2(a) was never specifically requested by the Department of the Interior to be introduced.

Senator BARTLETT. You are correct, I am sorry.

Chairman ABOUREZK. In your opinion is it the usual practice for the Corps of Engineers to compensate tribes without congressional authority, or should they have congressional authority? What is your view of that?

Mr. BUTLER. Mr. Chairman, it is my understanding that under the theory of navigational servitude, I am advised that it is not a legal base for compensation.

I would, however, Mr. Chairman, like to point out that there has been ample precedent, in my judgment, for compensation of this type relative to, let's say, the Missouri River basin, the Pick-Sloan plan which compensation was provided to the Indian owners of the inundated lands under the Celillo Falls inundation of the Columbia River. There are two examples to my knowledge of the power head compensation and the Yellow Tail Dam for the Crows, and for the Kerr Dam at the Flathead Reservation both in Montana. That is the Federal Power Commission Act.

Chairman ABOUREZK. Without authorization?

Mr. BUTLER. No; that is with authorization.

Chairman ABOUREZK. So it is a practice to have authorization; is that right?

Mr. BUTLER. Yes; there is ample precedent.

Chairman ABOUREZK. When did the Interior Department decide that legislation would not be necessary?

Mr. BUTLER. With specific respect to S. 660?

Chairman ABOUREZK. Yes.

Mr. BUTLER. About 7 o'clock last night, I will be very candid with the committee. [Laughter.]

Chairman ABOUREZK. You decided at 7 o'clock last night?

Mr. BUTLER. Yes.

Chairman ABOUREZK. Did the Office of Trust Responsibility of BIA ever take a position on this matter?

Mr. BUTLER. The Office of Trust Responsibility, prior to the decision that was made late yesterday afternoon, was in support of this bill, yes.

Chairman ABOUREZK. Would you submit for the record the statement of the position taken by the Office of Trust Responsibility?

Mr. BUTLER. Yes.

[The statement follows:]

"DIRECTOR, CONGRESSIONAL AND LEGISLATIVE AFFAIRS STAFF, ACTING DEPUTY DIRECTOR, OFFICE OF TRUST RESPONSIBILITIES, COMMENTS ON S. 660

"We recommend enactment of S. 660, "To authorize the Secretary of the Interior to enter into an agreement with the Cherokee, Choctaw and Chickasaw Indian Nations for the purchase and/or lease by the United States of each nation's right and interests in the riverbed of the Arkansas River, and for other purposes."

"After close review of the subject legislation we find only two provisions significantly altered from similar bills, H.R. 14253 and S. 3525 introduced in the second session of the 94th Congress. The provision in past legislation requiring consultation with the Attorney General of the United States prior to any Secretarial agreement with the three tribes involved is omitted within the present legislation. The second alteration within Sec. 2(a) eliminates the requirement for passage of a joint resolution for final approval of any agreement reached by the Secretary and the tribes. These modifications of the present legislation should enhance the quick passage of S. 660.

"The Cherokee, Choctaw and Chickasaw Indian Nations are still in complete agreement and support the enactment of the subject legislation."

Chairman ABOUREZK. The Department itself had approved this legislation and, in fact, had requested it. What made you change your mind at 7 o'clock last night?

Mr. BUTLER. Mr. Chairman, I again speak candidly. I think in my judgment the $177 million price tag was the major factor.

Chairman ABOUREZK. In your decision to change your mind?

Mr. BUTLER. Yes.

Chairman ABOUREZK. Was the decision directed to you or did you make it yourself?

Mr. BUTLER. No, the decision was directed to me.

Chairman ABOUREZK. By whom?

Mr. BUTLER. By the Department.

Chairman ABOUREZK. Who would that be in the Department?

Mr. BUTLER. That would be the Acting Secretary at the time, the Solicitor, Mr. Leo Krulitz.

Chairman ABOUREZK. He directed you to take a position in oposition to the bill?

Mr. BUTLER. Yes, under the theory that we do have under trust obligation the authority to do this already. In my judgment, Mr. Chairman, we do have. We will continue to pursue this very actively.

Chairman ABOUREZK. If you have the authority then it is not a violation of the administration's great principles that we pass the bill. So we are not changing much if we pass the bill; is that right?

Mr. BUTLER. You are giving a specific authorization of authority; that is correct.

Chairman ABOUREZK. Does the BIA have a position different from that of OMB on this matter?

Mr. BUTLER. Yes, sir.

Chairman ABOUREZK. It is in contradiction, isn't it?

Mr. BUTLER. Yes. Their view is related to the monetary suggestion.

Chairman ABOUREZK. I don't think you can testify to this because you were not an eyewitness probably but one of the OMB people said, "We don't owe those Indians a damn thing." They were talking about this bill.

That is not a very good way to negotiate or to enter into negotiation. I thought that the record ought to show the attitude of OMB, not only on this issue but on other issues.

I will yield to Senator Bartlett.

Senator BARTLETT. Mr. O'Connell gave the reason for changing the position as being the change in the content of the bill in section 2. I think the words "at the end of the 60-day period" make agreements submitted to Congress effective unless either House adopts a resolution disagreeing. If that language had been removed and the bill was introduced in exactly the same form as it was in the last Congress, would that remove the objection that you discussed earlier?

Mr. O'CONNELL. I could not testify to that, Senator. I would have to ask the Secretary of the Interior and the Solicitor that question.

Senator BARTLETT. I think you are certainly competent to answer the question. You say that the reason that it was opposed was because of this language. So what I am really asking you is that if you remove this language then the reason for the opposition would be removed and would you support the bill?

Mr. O'CONNELL. I personally would support the bill although it gives the Secretary more authority than he already has so I would support it.

Senator BARTLETT. You would see nothing wrong with giving him more authority than he already has; is that right?

Mr. O'CONNELL. Exactly.

Mr. BUTLER. Senator Bartlett, if I may add to that, let me say this. This particular section would, in my judgment, place one additional step in between that we would not necessarily have to use our trust authority and authorization authority of the Snyder Act. Coming to the plan for approval of the committee of Congress of the disapproval, as the case may be, we would merely, upon a negotiated agreement with the respective tribes, come forward in our appropriation acts under the Snyder Act authority.

Senator BARTLETT. You stated to the chairman in his questioning that the decision was reached late last night to oppose this legislation and that that decision was conveyed to you and directed to you by the Department of the Interior.

Mr. BUTLER. Yes.

Senator BARTLETT. Were they in turn directed by OMB to opposed the bill?

Mr. BUTLER. I do not have personal knowledge of that, Senator, but I strongly suspect that that is what took place.

Senator BARTLETT. It seems to me, and this is not in the form of a question, that in the exercise of the trust responsibility by the Department of the Interior and BIA that it is not being properly, fully, and adequately represented when another department can direct its representations of tribal matters. So it is obvious that the testimony today is in contradiction to the real desires of the BIA and the Department of Interior.

I think this strikes at the very fabric of the structure of support and representation that the tribes should receive.

It certainly is very upsetting that the advocate, the trustee, for the Indians is not taking the role of advocacy, in this instance, but instead has rolled over and played dead to another department which has dictated to it what it should say.

I do not think our Government is supposed to work this way.

Chairman ABOUREZK. If the Senator will yield, I think that not only is the Bureau of Indian Affairs the trustee but the Bureau of Indian Affairs is one designated agency to act as trustee but in fact the entire Government is a trustee to the tribes. That includes OMB. I think that has been lost over there.

How long do you think it would take to negotiate this type of agreement with the tribes? Do you have an opinion on that?

Mr. BUTLER. Mr. Chairman, if you allow me the first 6 months to get my cup of coffee. [Laughter.]

In discussing this with Solicitor Krulitz this morning, this is a very, very serious trust responsibility in my judgment and from our point of view I would like to suggest, if the chairman wishes to pin me to a target date, of perhaps giving us at least 1 year to work on this and perhaps also pose the question to the respective tribes.

I have not discussed this with them. I think to definitively define a timetable as trustee it is my role to consult with the tribal leaders as to a negotiated timetable.

Chairman ABOUREZK. So you think 1 year at the outside; is that correct?

Mr. BUTLER. Yes; I would appreciate that because I have not had the opportunity to consult with them on this timeframe. It is a very serious matter, in my judgment. It is one that I would not wish to rush into.

Chairman ABOUREZK. We will get the view of the tribes right away. We will most likely have to amend this.

Before you came, Senator Bartlett, Senator Bellmon and I discussed a time limit.

Senator BARTLETT. I understand the tribes think 6 months is the time. I am not sure about that.

May I ask a question along that line?

Chairman ABOUREZK. Certainly.

Senator BARTLETT. When would the Bureau be ready to begin negotiations?

Mr. BUTLER. We could begin negotiations right away. In fact, I have a tentatively scheduled meeting with the respective tribes on the Arkansas riverbed relative to this year's funding and it is scheduled for June 1.

Senator BARTLETT. You are tentatively scheduled for what?

Mr. BUTLER. A meeting with the respective tribes involved in the Arkansas riverbed.

Senator BARTLETT. For negotiations?

Mr. BUTLER. It basically comes about, Senator, from a commitment I made to a group of them approximately a month ago when we were discussing the distribution of the current year's funding. There were some differences. We did a study on that. I committed myself to meet further with them to share our findings with them in order to get their views and we tentatively set that for June 1 in Tulsa, Okla.

Senator BARTLETT. You think that could get into negotiations?

Mr. BUTLER. Yes; it could very well be.

Senator BARTLETT. If it does not then when will you negotiate with the tribes?

Mr. BUTLER. As I say, this could start it. I feel, as our trust responsibility, that we should enter into this negotiation stage, very, very shortly.

Senator BARTLETT. Would you agree that you should be negotiating with the tribes by June 1?

Mr. BUTLER. Yes.

Senator BARTLETT. Would you agree to negotiate with the tribes and begin that by June 1 at that meeting in Tulsa?

Mr. BUTLER. As I say, it is tentatively scheduled. I have not been able to communicate with all of the respective tribes.

Senator BARTLETT. Would you agree to begin negotiations——

Mr. BUTLER. Excuse me. In June it would be the convenience of all the tribes.

My basic philosophy in a matter of this kind, Senator, is that I wish to have all the tribes present when we are discussing such serious matters.

Senator BARTLETT. So that I have this straight, would you agree with the three tribes—the Cherokee, Choctaw, and Chickasaw—to begin negotiations with them on this matter by June 1 of this year, if they are ready? And if they are not ready, would you negotiate at the earliest moment after that date?

Mr. BUTLER. At a mutually convenient time to us all; yes.

Chairman ABOUREZK. For the record, Senator Bellmon testified and from your testimony: Are the appraisals of all of this property completed?

Mr. BUTLER. Mr. Chairman, we have our technicians here. I am not prepared to confirm that, but it is my understanding that, by and large, they are all completed and pretty well agreed to by all parties.

Chairman ABOUREZK. Who is your technician?

Mr. BUTLER. Jack Chaney.

Chairman ABOUREZK. Jack, would you come up?

What is your position?

Mr. CHANEY. Jack Chaney, I am Director of the Arkansas riverbed project in the Muskogee area office. Muskogee, Okla.

Chairman ABOUREZK. Have you been conducting the appraisals?

Mr. CHANEY. We are contracting and we are all under contract by individual contracators—

Chairman ABOUREZK. For appraisal?

Mr. CHANEY. Yes.

Chairman ABOUREZK. Have the appraisals come in?

Mr. CHANEY. Yes.

Chairman ABOUREZK. You have nothing more to do with regard to appraisals?

Mr. CHANEY. The only thing we have that has been expressed by the tribes is based upon whether or not they should do an industrial development appraisal along the river for a large traffic study.

The original land appraisals, mineral appraisals that were set up have already been completed. These are additional.

Chairman ABOUREZK. Does the large traffic study have to do with this legislation?

Mr. CHANEY. No.

Chairman ABOUREZK. So everything as far as the appraisals are concerned is completed.

Mr. CHANEY. Yes, sir.

Chairman ABOUREZK. So you are ready for negotiations.

Mr. CHANEY. Yes.

Chairman ABOUREZK. That is what I want to establish.

On the appraisal, Mr. Butler, is the Department satisfied that the appraisals were done fairly and at arm's length as Senator Bellmon has testified?

Mr. BUTLER. Yes, Mr. Chairman. We feel it was done by competent professional people.

Chairman ABOUREZK. Is it your opinion that the appraised values are fair and equitable to both sides?

Mr. BUTLER. I have not had enough personal experience with the respective tribes to confirm that at this time. I think that would be part of the negotiation process.

Jack Chaney, these have been accepted by the tribes?

Mr. CHANEY. Yes.

Mr. BUTLER. They have been accepted by the tribes.

Chairman ABOUREZK. So they are fair and equitable from the point of view of the Government, and according to Mr. Chaney he has already indicated that the tribes have accepted them; is that right?

Mr. BUTLER. Yes.

Chairman ABOUREZK. Would private individuals pay for the management of these rivers that were owned by them earlier?

Mr. BUTLER. I understand, Mr. Chairman, that under the navigational servitude theory the river level was brought up to a certain level and that there were some lands above the water line that were purchased. Is that correct, Mr. Chaney?

Mr. CHANEY. Yes; that is correct.

Mr. BUTLER. Mr. Chaney says that is correct.

It was purchased by the Corps of Engineers.

Chairman ABOUREZK. We have no more questions. We want to thank you for your testimony.

Mr. BUTLER. Thank you, Mr. Chairman.

Mr. DANIELSON. Sir, I am not picking on you. I am trying to find out what is behind here. I am loath to lift the bar of limitations, but if there is compelling equitable reason I am willing to do it. I have done it.

I do want to know this though, in handling these Indian claims over a period of a decade I have picked up a little grass roots knowledge of them. The Government is deemed to be a trustee, as I

understand it, for Indian tribes, nations, and individuals for certain types of property interests, is that not true?

Mr. LIOTTA. A trustee if it arises under a treaty, Executive order, or that type of thing.

Mr. DANIELSON. Well, some of them go way back to the Civil War. I mean they go way back. Well, they wanted a third of the State of Maine last year or 2 years ago.

Mr. LIOTTA. It was the Maine and Posimaquadi situation.

Mr. DANIELSON. That went back to 1789, if I am not mistaken. But you have a fiduciary problem here which may or may not be germane to this case. If the Department of the Interior, which is an arm of the Government and is the arm through which the fiduciary trustee relationship is exercised, if they did not bring an action to protect this Cherokee interest before 1976, why didn't they?

Mr. LIOTTA. Well, I would suppose that it never occurred to them that they ever had any legal rights to the navigable bed anyway.

Mr. DANIELSON. Does a trustee have the right not to know what his obligations are?

Mr. LIOTTA. Well, if I were the trustee in this case, I would realize that to bring an action to recover for property within the navigable waters of the United States would be a waste of the courts time. I would not do it.

Mr. DANIELSON. I do not think that is judgmental though.

Mr. LIOTTA. Excuse me, sir, I think I owe a duty to the Indians or whoever I am trustee for to act responsibly in that situation.

Mr. DANIELSON. This bothers me and I am not quarreling with you. Your answer is perfectly lawyerlike and perfectly correct and honest. But I do worry sometimes when the United States is also sitting in a fiduciary capacity as trustee and is honor bound, legally bound, to follow the laws of the United States. Can that trustee be excused for not acting within the period of limitations and then raise it's own law, it's own period of limitations, as a bar to subsequent action. That bothers me.

Mr. LIOTTA. If I may, sir, I know you like a direct answer and I will try to be as direct as I can.

Mr. DANIELSON. Surely.

Mr. LIOTTA. I think in situations where the United States is trustee, they brought many actions on behalf of the Indians.

Mr. DANIELSON. Oh, they have but there is a lot they have not brought, I know that.

Mr. LIOTTA. Yes, sir. But as trustee also wherein I suggested the statute of limitations had precluded them, I think as trustee also you have to look at the legal support for what you are doing.

If, as trustee you find there is no legal support, you do not do anything.

Mr. DANIELSON. All right. Let me throw out the last one of these. Forget the Government now. Have a normal trust beneficiary relationship. Just an ordinary one. The Bank of America is a trustee for Mary Smith. And the trustee fails to act within a period of limitations and Mary Smith has what could be a valid lawsuit, a cause of action. And could not the beneficiary then, if the trustee failed to act, bring an action against the trustee for breach of his fidu-

ciary duty, an action in negligence, malpractice is what we are really talking about.

Mr. LIOTTA. I think that if the party had a bona fide claim, there would be a real problem. I would not want to be the trustee.

Mr. DANIELSON. But you never know whether the claim is bona fide until it has been litigated.

Mr. LIOTTA. Not necessarily. I mean, there are certain points that the Supreme Court and the courts have spoken on so many times that I do not think anyone would hold you responsible.

Mr. DANIELSON. Well, my guess is that if the benificiary alleged a proper cause of action on the failure of the trustee to bring a lawsuit within the period of limitations, particularly if the existence of that cause of action was known to the trustee, I do not think that pleading could be knocked out on a motion for summary judgement. It would have to be tried.

Mr. LIOTTA. You might have to. I am not sure.

Mr. DANIELSON. Thank you. You have answered my questions very well. I will appreciate anything you can do to help me on these problems that concern me.

Mr. Synar?

Mr. SYNAR. Mr. Chairman, at this point I would ask for unanimous consent that any of our witnesses today, both the tribal representatives and Justice Department, if they have additional remarks based upon anything we have said today, if we could leave the record open for——

Mr. DANIELSON. A while, yes.

Mr. SYNAR. A while.

Mr. DANIELSON. I am going to say this. We do know that Congress will adjourn within the next several days and is not expected to reconvene until about the 20th or 25th of January. Why don't we say if you have anything else you would like to submit, could you get it in by say the first of February? Would that be all right? Mr. Synar?

Mr. SYNAR. Yes, sir.

Mr. DANIELSON. That would give you a little bit of time. And I want you to enjoy your Christmas anyway.

Mr. LIOTTA. Yes, sir.

Mr. DANIELSON. Watch Nebraska beat Clemson in the Orange Bowl on New Year's Day.

Thank you very much. I appreciate your help. And please do not misconstrue my directness as being personal, it is just that I want to get to the bottom of this.

Mr. LIOTTA. Mr. Chairman and members of the committee, it has been a real pleasure.

Mr. SYNAR. Mr. Chairman?

Mr. DANIELSON. Yes.

Mr. SYNAR. At this point too I would ask the indulgence of the subcommittee if they might write a letter to the Department of the Interior and try to get as specific answer as possible as why they were not here.

Mr. DANIELSON. Certainly. And would you be willing to cooperate with our committee on that?

Mr. SYNAR. I will.

Mr. DANIELSON. Surely. Well, we always have interesting bills in this committee. We do not always achieve them but we have one more. I do not have my work sheet here, Bill. Oh, here we are. Thank you.

We have the bill H.R. 2484 for the relief of Raymond W. Quillian.

[Whereupon at 12:35 p.m., the subcommittee proceeded to other business.]

[The following was received for the record:]

ADDITIONAL MATERIAL

U.S. DEPARTMENT OF JUSTICE,
LAND AND NATURAL RESOURCES DIVISION,
Washington, D.C., February 28, 1982.

Hon. GEORGE E. DANIELSON,
Chairman, Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During your subcommittee's hearing on H.R. 2329 on December 9, 1981, you requested the Department's views concerning any limitations on the authority of the United States to exercise its navigation servitude with respect to the beds of navigable rivers owned by Indian tribes. More specifically, the question posed was whether the traditional rule of law that the owner is not entitled to compensation for any destruction of his property resulting from a federal project in aid of navigation, is applicable when the owner is an Indian tribe.

The navigation servitude has been defined in *United States* v. *Rands*, 389 U.S. 121 (1967). The Supreme Court's decision in that case makes it clear that the fifth amendment does not require the United States to compensate property owners when the servitude is exercised:

"The Commerce Clause confers a unique position upon the Government in connection with navigable waters." "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of *all the navigable waters of the United States.* * * * For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." *Gilman* v. *Philadelphia*, 3 Wall. 713, 724-725 (1866). *This power to regulate navigation confers upon the United States a "dominant servitude," FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954), *which extends to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it,* for the damage sustained does not result from taking property from riparian owners within the meaning of the fifth amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. *United States* v. *Chicago, M., St. P. & P.R. Co.*, 312 U.S. 592, 596-597 (1941); *Gibson* v. *United States*, 166 U.S. 269, 275-276 (1897). Thus, without being constitutionally obligated to pay compensation, the United States may change the course of a navigable stream, *South Carolina* v. *Georgia*, 93 U.S. 4 (1876), or otherwise impair or destroy a riparian owner's access to navigable waters, *Gibson* v. *United States*, 166 U.S. 269 (1897); *Scranton* v. *Wheeler*, 179 U.S. 141 (1900); *United States* v. *Commodore Park, Inc.*, 324 U.S. 386 (1945), even though the market value of the riparian owner's land is substantially diminished. 389 U.S. at 122-123 [emphasis supplied]."

In *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53 (1913), the plaintiff claimed it was entitled to just compensation for the "water power capacity" allegedly taken when the United States constructed dams and dykes to control the current of St. Mary's River in Michigan. In rejecting plaintiff's position that the Fifth Amendment protected its interest in water power capacity, the Court stated:

"This title of the owner of fast land upon the shore of a navigable river to the bed of the river, is at best a qualified one. * * * It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the States and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress. * * * If, in the judgment of Congress, the use of the bottom of the river is

proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation. If its judgment be that structures placed in the river and upon such submerged land, are an obstruction or hindrance to the proper use of the river for purposes of navigation, it may require their removal and forbid the use of the bed of the river by the owner in any way which in its judgment is injurious to the dominant right of navigation. 229 U.S. at 62."

In *Coastal Petroleum Co.* v. *United States,* 524 F. 2d 1206 (Ct. Cl. 1975), a case involving claims analogous to the type that presumably would be asserted by the Cherokee Nation if H.R. 2329 is enacted, the Court of Claims held that the effect of the navigational servitude is not reduced by the fact that the government may have received some "commercial benefit" from the use of the owner's property. In that case, plaintiff claimed compensation for the government's use (as part of a flood control project) of limestone removed from the bottom of a navigable lake. The Court of Claims upheld the government's position that no compensation was required since the limestone was used in connection with the proper exercise of the government's navigation seritude.

A different result obtains, however, where Congress, through legislation, specifically provides for compensation of the owners of "submerged lands in navigable waters." *Coastal Petroleum, supra* at 1210. Congress has, from time to time, adopted this approach with respect to Indian tribes. For example, in the Act of June 4, 1920, ch. 224, § 10, 41 Stat. 751, 754, Congress provided that land on the Crow Indian Reservation in Montana that was valuable for water power development should be reserved from sale and "held for the benefit of the Crow Tribe of Indians." *United States* v. *5,677.94 Acres of Land,* 16 F. Supp. 108, 116 (D. Mont. 1958). Also, the Court of Claims in *Confederated Salish and Kootenai Tribes* v. *United States,* 181 Ct. Cl. 739 (1967), found that Congress intended to compensate the Indian Tribes for power values of riparian land when it enacted Section 10(e) of the Federal Water Power Act, ch. 285, 41 Stat. 1063, 1069 (1920), and required payment of a reasonable annual charge for the use of that land. In that case, Congress, with respect to the specific tribes, had enacted legislation requiring rentals for use of their reservation by licensees of the Federal Power Commission. In the absence of legislation, however, we know of no instance where an Indian tribe was treated any differently by the courts with regard to the issue of compensation for riparian rights than other property owners.

This conclusion is fully supported by the Supreme Court's decision in *Choctaw Nation* v. *State of Oklahoma,* 397 U.S. 620 (1970), involving a dispute over title to land underlying the navigable portion of parts of the Arkansas River. In that case, which is directly related to the subject matter covered in H.R. 2329, the Court held that the land belonged to the Choctaw, Chickasaw and Cherokee Nations but indicated that their title was subject to the pre-existing right of the United States to exercise its navigational servitude.

"Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce. 397 U.S. at 635."

We are convinced, therefore, that the Arkansas River was, and is, subject to the government's navigational servitude and that the Cherokee, Choctaw and Chickasaw Nations are not entitled to compensation for activities of the United States in furtherance of navigation.

Sincerely,

ANTHONY C. LIOTTA,
Deputy Assistant Attorney General,
Land and Natural Resources Division.

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